Supreme Court of the United States.
Dennis **DAUGAARD**, Governor of South Dakota, and Marty J. Jackley, Attorney General of South Dakota, Petitioners,
v.
YANKTON SIOUX TRIBE and United States of America, Respondents.
No. 10-929.
January 18, 2011.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Act of 1894 disestablished the Yankton Sioux Reservation.

***II** PARTIES

The caption of the case contains the names of all the parties to the proceeding, except Pam Hein, State's Attorney of Charles Mix County; Keith Mushitz, Member of the Charles Mix County, South Dakota, County Commission; Neil Von Eschen, Member of the Charles Mix County, South Dakota, County Commission; Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission; and Southern Missouri Waste Management District. The Yankton Sioux Tribe represents itself and its individual members.

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***1** PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on May 6, 2010, insofar as the judgment and opinion find that the Yankton Sioux Reservation has not been disestablished.

OPINIONS BELOW

The Amended Opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 994 (8th Cir. 2010) (*Podhradsky IV*) and is reprinted in the Appendix (App.) at 1-51. The Eighth Circuit also issued an Order on Petitions for Rehearing, reported at *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 985 (8th Cir. 2010) (*Podhradsky III*), and reprinted at App. 52-70. The opinion of the Eighth Circuit, which was later amended, is reported at *Yankton Sioux Tribe v. Podhradsky,* 577 F.3d 951 (8th Cir. 2009) (*Podhradsky II*) and is reprinted at App. 71-121. The Memorandum Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Podhradsky,* 529 F. Supp. 2d 1040 (D.S.D. 2007) (*Podhradsky I*) and is reprinted at App. 122-63. The earlier opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999) (*Gaffey II*) and is reprinted at App. 199-249. The Memorandum ***2** Opinion and Order of the District Court for the District of South Dakota is reported at *Yankton Sioux Tribe v. Gaffey,* 14 F. Supp. 2d 1135 (D.S.D. 1998) (*Gaffey I*) and is reprinted at App. 250-320.

JURISDICTION

The judgment of the Eighth Circuit was entered on May 6, 2010. The Eighth Circuit denied timely Petitions for rehearing and suggestions for rehearing en banc on September 20, 2010. App. 321-22. The Honorable Samuel Alito, Associate Justice, on December 14, 2010, extended the time for the filing of Petitions for Writ of Certiorari to January 18, 2010. App. 323. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at App. 324-36.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at App. 337-51.

The statute defining “Indian country” at 18 U.S.C. § 1151 states:
Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian ***3** country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

INTRODUCTION

More than twelve years ago, this Court granted certiorari to resolve a conflict between the South Dakota Supreme Court and the Eighth Circuit as to whether an 1894 statute that ratified an agreement between the Yankton Sioux Tribe and the United States diminished or disestablished the Yankton Sioux Reservation. After briefing and argument, the Court concluded that the Act's “ ‘cession’ and ‘sum certain’ ” language is “ ‘precisely suited’ to terminating reservation status.” *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 344 (1998). The Court accordingly held that the Act was “readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries.” *Id.* at 345. The Court expressly left open, however, ***4** the question “whether Congress disestablished the reservation altogether [.]” *Id.* at 358. The next year, the South Dakota Supreme Court and the Eighth Circuit issued opinions on that very issue. Each court recognized that the 1858 boundaries were extinguished but each reached conflicting results on the issue of disestablishment, with the South Dakota Supreme Court finding the reservation disestablished and the Eighth Circuit finding it still in existence. Petitions for certiorari were filed by the State, local governments and Tribe, but the United States resisted, essentially telling this Court that the Petitions were premature because of an additional remand. The Petitions were denied. *South Dakota v. Yankton Sioux Tribe,* 530 U.S. 1261 (2000).

The conflict intensified. Following further litigation, the Eighth Circuit affirmed the existence of a permanent “reservation” of 37,600 acres and declared it to consist of more than 200 noncontiguous parcels of allotted land, land taken into trust under the Indian Reorganization Act (25 U.S.C. § 465), and agency land.[FN1] Each parcel is individually encompassed by § 1151(a) “reservation” boundaries and constitutes a “mini-reservation” within the extinguished boundaries. The designation of allotted and trust lands as § 1151(a) “reservation” is especially ***5** problematic given the finding of the Eighth Circuit that, after the enactment of § 1151 in 1948, allotted and trust lands which fell within extinguished 1858 reservation boundaries retain their status as “reservation” even after they are patented and transferred to non-Indians. As a result, an additional 5,900 acres of land held today in fee by non-Indians within the extinguished boundaries may now be claimed as “reservation.” The proceedings on remand thus have confirmed the breadth of the conflict and far-reaching implications of the Eighth Circuit's ruling, and review by this Court is urgently needed to end this untenable situation.

FN1. The State's analysis of 2007 Ex. 209, the Map at App. 352, reveals that the number of parcels of land, or clusters of such parcels, designated by *Podhradsky IV* as “reservation,” which did not in any way touch any other such parcels, is approximately 200.

STATEMENT OF THE CASE

A. History of the Reservation.

This case once again brings to this Court's attention the facts related to the creation and cession of the Yankton Reservation. *See Yankton Sioux Tribe,* 522 U.S. at 333-40. In 1858, the United States entered into a treaty with the Yankton Sioux Tribe in which the Tribe "ceded" substantial lands in exchange for the United States' "pledge[ ] to protect the Yankton Tribe in their 'quiet and peaceable possession' of this reservation," which was later surveyed and determined to encompass 430,405 acres. *Id.* at 334.[FN2] ***6** Subsequently, under "pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership," Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (commonly known as the Dawes Act). *Yankton Sioux Tribe,* 522 U.S. at 335. Pursuant to that Act, "each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years." *Id.* at 336.

FN2. The 1858 Treaty indicated that the size of the reservation was 400,000 acres; after the 1858 Treaty was ratified, the United States performed a survey and determined that it actually contained 430,405 acres. 1995 Transcript 10, 221-22, 255. The term "1995 Transcript" refers to the transcript of the original trial of this matter on April 3-7, 1995. The term "1998 Transcript" refers to the evidentiary hearing, on May 20, 1998, in the litigation following this Court's remand. The term "1998 JA" refers to the Joint Appendix filed in the Eighth Circuit in 1998. The term "2007 Ex." refers to exhibits at the 2007 trial. The term "2008 SA" refers to the State's Appendix in the Eighth Circuit in 2008.

Allotment proceeded quickly. By 1890, 167,325 acres had been allotted under the Dawes Act; 95,000 additional acres were subsequently allotted under the Act of February 28, 1891, 26 Stat. 795. *Yankton Sioux Tribe,* 522 U.S. at 336. This left a surplus of approximately 168,000 acres of unallotted lands. *Id.* In 1892, Congress enacted 27 Stat. 120, 137, which authorized funds "to enable the Secretary" of the Interior in his discretion to "negotiate with any Indians for the surrender of portions of their respective reservations." In the same year, the United States appointed the Yankton Indian Commission. 1998 JA 97. Negotiations followed during which the parties ***7** discussed the contemporaneous Lake Traverse cession in South Dakota, which disestablished that reservation, along with the pending Yankton Agreement, not distinguishing the two except for the fact that larger payments were proposed in the Yankton Agreement. 1998 JA 149, 163, 167, 177.

The agreement reached between the Yankton tribal members and the United States provided, in Article I, that the Tribe would "cede, sell, relinquish, and convey to the United States … all the unallotted lands on the reservation." Agreement, App. 339; *Yankton Sioux Tribe,* 522 U.S. at 338. In Article II, the United States agreed to pay the Tribe $600,000, or $3.60 an acre. *Id.* As a result of the 1894 Act, the Tribe retained no land for itself in common. *Gaffey II,* App. 229-30; 1998 Transcript 45-46. Tribal members disposed of most of their allotments in a fairly short period of time. By 1930, the Yankton Indians owned only 43,358 acres. *State v. Greger,* 559 N.W.2d 854, 867 (S.D. 1997). By the time of initial trial in this case in 1995, at least 88 percent or 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians. See *Yankton Sioux Tribe,* 522 U.S. at 339. *See also* App. 352 (Map).

Among the lands "ceded" to the United States for payment in 1894 were lands described in Article VIII as "occupied by the United States for agency, schools, and other purposes" (commonly known as "agency" lands). Agreement, App. 342-43. Article VIII reserved the ceded agency lands "from sale to settlers ***8** until they are no longer required for such purposes." *Id.*

In 1929, Congress provided that the ceded agency lands could be transferred to the Tribe, but only “when they are no longer required for agency, schools, or other purposes.” Act of February 13, 1929, ch. 183, 45 Stat. 1167. In a 1934 opinion, the Solicitor of the Department of the Interior held that the United States had “permanently discontinued” the use of the lands and that they were “no longer needed for any of such purposes.” 1998 JA 572. He therefore held that the lands, which were thought to constitute approximately 1,000 acres,[FN3] belonged to the Yankton Sioux Tribe. *Id.*

FN3. The actual amount of agency land was probably about 1,200 acres.

B. The First Round of Litigation.

The dispute over the status of the reservation commenced after the Southern Missouri Recycling and Waste Management District acquired a site for a municipal solid waste facility on land ceded in the 1894 Act. The Waste District sought a state permit for the landfill. After state courts rejected environmental challenges, the Yankton Tribe filed suit in the United States District Court for the District of South Dakota seeking to enjoin construction of the landfill. The Waste District joined South Dakota as a third party so that the State could defend its jurisdiction to issue ***9** the permit. The district court declined to enjoin the landfill project, but ruled that the 1894 Act did not disestablish or diminish the Reservation. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,* 890 F. Supp. 878, 891 (D.S.D. 1995). A divided panel of the Eighth Circuit affirmed, relying principally (as had the district court) upon the “savings clause” of Article XVIII of the Agreement. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,* 99 F.3d 1439, 1447-48 (8th Cir. 1996). This Court granted certiorari and reversed. *Yankton Sioux Tribe,* 522 U.S. 329.

The Court based its decision primarily on the plain language of the 1894 statute. In particular, the Court found that Articles I and II of the Agreement contained “ ‘cession’ and ‘sum certain’ language [which] is ‘precisely suited’ to terminating reservation status.” *Id.* at 344. The Court cited *DeCoteau v. District County Court,* 420 U.S. 425, 445 (1975) as support for that conclusion and continued:

The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau* … and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe.

Id. at 344 (citing *DeCoteau,* 420 U.S. at 445). The Court rejected the holding of the district court that the Article XVIII savings clause should be given decisive effect. *Yankton Sioux Tribe,* 522 U.S. at 345-49.

***10** Although earlier passages in the Court's opinion indicated that the Yankton Reservation was disestablished, the Court chose not to determine whether the Reservation was “disestablished … altogether.” *Id.* at 358. Observing that it “need not determine” that issue to decide the case before it, the Court elected to “limit [its] holding to the narrow question presented.” *Id.* The Court did so after noting “conflicting understandings about the status of the reservation” and alluding to the Tribe's ownership of “land in common.” *Id.* The Court therefore reversed and remanded the case for further action. *Id.*

C. The Second Round of Litigation.

1. On remand, the district court consolidated the Tribe's initial action with a declaratory judgment action brought by the Tribe to challenge state criminal jurisdiction over acts of tribal members on originally allotted land within the original reservation boundaries. The United States joined as a party supporting the Tribe. After an evidentiary hearing, the district court held that the original boundaries of the Reservation remained intact. *Gaffey I,*

App. 318-20. Further, the district court found that all lands within those original boundaries that were not ceded in the 1894 Act, i.e., all allotted lands, remained part of the reservation (*Gaffey I,* App. 318-19), even though roughly 88 percent of the allotted lands had been transferred to non-Indians. *Yankton Sioux Tribe,* 522 U.S. at 339. The district court also held that the "agency lands" which had been ceded by the Tribe to ***11** the United States under Article VIII retained reservation status. *Gaffey I,* App. 319.

2. Reversing the district court in part, the Eighth Circuit held that the boundaries of the 1858 reservation were not maintained. *Gaffey II,* App. 248-49. The court further held allotted land which had left Indian ownership was no longer part of the Reservation or "Indian country" of any kind: "we hold that the [reservation] … has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Gaffey II,* App. 247. However, the Eighth Circuit affirmed the district court's holding that the Reservation had not been "disestablished," finding the Reservation consisted of certain former "agency lands" later conveyed to the Tribe and, potentially, an unknown quantity of "trust" land. *Gaffey II,* App. 249.

In holding that the 1894 Act did not disestablish the Yankton Reservation, the Eighth Circuit began, necessarily, at attempting to distinguish *DeCoteau*, in which this Court held that an agreement which ceded all of the tribe's unallotted lands for a sum certain disestablished that reservation. See discussion at II.A, *infra.* It found that the Yankton Agreement's "cession and sum certain" language was immaterial because it explicitly referred only to the ceded lands. *Gaffey II,* App. 237. Having brushed past the very language and rationale that controlled *DeCoteau* and *Yankton Sioux Tribe*, the court turned to the bare negotiating history for guidance, determining that the reservation had not been disestablished, and that ***12** the 1,000 acres of agency land ceded to the United States in 1894 and conveyed to the Tribe by virtue of the 1929 Act remained "reservation." *Id.* at App. 249.

The Eighth Circuit left to the "district court on remand to make any necessary findings relative to the status of Indian lands which are held in trust." *Id.* It thus directed the district court to initially determine which, if any, of the allotted lands then held in trust and other lands taken into trust under various statutes, including the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, were "reservation" under § 1151(a).[FN4]

FN4. As discussed in Section II.B, *infra*, Congress enacted § 1151 in 1948 to confirm the definition of "Indian country." Subsections (a), (b), and (c) define three different categories of Indian country, the first of which is reservation land. The statute was amended in 1949, in a minor way not relevant here.

Petitions for rehearing were filed by the State, Charles Mix County, the Waste District, and the Tribe, all of which were denied. Chief Judge Wollman and Judges Beam and Loken would have granted the State, County, and Waste District Petitions; the latter two judges would also have granted all of the Petitions. The State, local governments, and the Tribe sought certiorari. The United States resisted, telling this Court that the decision was "interlocutory in nature" because of the Eighth Circuit's remand and that this Court would, on completion of the litigation, have a "further opportunity to review" the decision. Brief for the United States in Opposition, *South* ***13** *Dakota v. Yankton Sioux Tribe,* Nos. 99-1490 and 99-1683, at 27. Certiorari was denied. *South Dakota v. Yankton Sioux Tribe,* 530 U.S. 1261 (2000).

D. The Third Round of Litigation.

On remand, the district court determined that all land allotted to individual Indians which remained in allotted status, all land taken into trust under the Indian Reorganization Act, and agency land conveyed to the tribe by virtue of the Act of 1929 was "reservation" under § 1151(a). *Podhradsky I,* App. 161-63. It further found that

fee lands held continuously by individual Indians were "reservation." *Id.*

Two opinions and one order of the Eighth Circuit followed. In the first of the opinions, *Podhradsky II*, the Eighth Circuit affirmed the district court, with a minor exception. Its earlier non-disestablishment ruling was affirmed on "law of the case" grounds. *Podhradsky II,* App. 90. The Eighth Circuit declared that agency lands, allotments which remained in allotted status, and IRA trust lands, have "reservation" status under § 1151(a). *Id.* at App. 120-21. A small quantity of miscellaneous trust lands were found to constitute dependent Indian communities under § 1151(b). *Id.* at App. 120. The portion of the district court opinion holding that fee lands continuously held in Indian ownership were "reservation" was vacated as there was no evidence of such lands. *Id.* at App. 115-16, 120-21.

***14** The Eighth Circuit also found, for the first time, that the 1948 "Indian country" definition in § 1151 "gave a previously unimagined durability to reservation land ... while prior to 1948 an allotment on reservation land would have ceased to be Indian country upon its sale to white owners, that is no longer the case today." *Id.* at App. 103-04. The court found no evidence that non-Indians owned any such lands. *Id.* at n.10.

Petitions for rehearing and rehearing en banc were filed by the State and County focusing on the status of allotted lands which had lost that status after 1948. The State's analysis of 2007 Ex. 210 later showed there to be at least 5,900 such acres. The Eighth Circuit, in response to the Petitions, found in an Order on Petition for Rehearing that its language relating to the lands which had lost allotted status post-1948 had not been "incorporated into our judgment." *Podhradsky III,* App. 55. The Eighth Circuit announced that it would excise "footnote 10 and several textual asides" to reduce any potential misunderstanding. *Id.* at App. 56. An Amended Opinion was thereupon issued and it is this opinion, and judgment thereon, which are the subject of this Petition. *Podhradsky IV,* App. 1-51.

Podhradsky IV generally tracks the earlier opinion and relies on the "law of the case" of *Gaffey II* for the proposition that the reservation had not been disestablished. *Podhradsky IV,* App. 20-25. The "reservation" was found to consist of three types of land: (1) 30,051.66 acres of allotted trust lands, or ***15** lands which have been continuously in allotted status; (2) 913.83 acres of agency lands; and (3) 6,444.47 acres of lands acquired in trust for the Tribe under the 1934 IRA. *Id.* at App. 12-13; 51. About 200 non-contiguous parcels within the extinguished boundaries were thus declared to be "reservation." *See* Map at App. 352.[FN5]

FN5. All of the lands on the Map in a color darker than the background are thus "reservation" except for a few parcels of tribal lands held in "unrestricted fee" status and shown in blue-grey.

Despite the excision of certain language relating to the effect of § 1151(a) referred to in *Podhradsky III,* App. 55-56, *Podhradsky IV* continued to rely upon the same concepts. In particular, *Podhradsky IV* finds that § 1151 separated the "concept of jurisdiction from the concept of ownership." *Podhradsky IV,* App. 27. Thus, prior to 1948, and the enactment of § 1151, allotted lands which lost allotted status under § 1151(c) within the former boundaries also lost their characteristic as "Indian country." *See id.* at App. 28. After the enactment of § 1151, according to *Podhradsky IV*, allotted lands within the former boundaries also qualify as "reservation," under § 1151(a), *id.* at App. 51, and retain their "reservation" and "Indian country" status even when the allotted status is surrendered. *See id.* at App. 28-29. At least 5,900 acres of allotted lands have, in fact, lost allotted status since 1948; these lands are now owned by non-Indians. *See* 2007 Ex. 210. All of this ***16** former allotted land is, at least arguably, permanent "reservation" owned by non-Indians within the extinguished boundaries under *Podhradsky IV.*

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Eighth Circuit Squarely Conflict with the Decision of the Unanimous South Dakota Supreme Court.

One day after the Eighth Circuit rejected a finding of disestablishment in *Gaffey II*, the South Dakota Supreme Court issued *Bruguier v. Class,* which unanimously held that the 1894 Act did disestablish the Yankton Sioux Reservation. 599 N.W.2d 364 (S.D. 1999) (reprinted at App. 164-98). That holding directly conflicts with *Podhradsky IV*, which in turn relies on *Gaffey II* as the "law of the case." App. 20-25.

In the state court case, James Bruguier was convicted of burglary committed within the original boundaries of the Yankton Reservation on allotted land to which Indian title had been extinguished. *Bruguier,* App. 165-66. Bruguier's habeas corpus petition asserted that the Reservation remained intact and therefore the State lacked jurisdiction over the crime. *Id.* at App. 165. The habeas judge concluded that the Reservation had been "disestablished" and denied the petition. *Id.* at App. 166. The South Dakota Supreme Court, following this Court's lead in *Yankton Sioux Tribe, DeCoteau*, and its own precedent affirmed, concluding that the 1894 Act disestablished, or in the ***17** equivalent words of this Court, *DeCoteau,* 420 U.S. at 425, and the South Dakota Supreme Court, terminated the reservation. *Bruguier,* App. 196-97.

The South Dakota Supreme Court found that the statutory language, the historical context, and later developments in the area all strongly supported termination. As to the former, the court stated that the cession and sum certain language of the Yankton Agreement manifests an almost irrebuttable presumption of congressional intent to terminate. *Id.* at App. 181. This reading is supported, the court ruled, by late nineteenth century views of Indian ownership: At the time it was commonly understood that when tribal ownership was eliminated (for example, by allotting all tribal land to individual Indians), a " 'critical component of reservation status' was lost." *Id.* at App. 185 (quoting *Yankton Sioux Tribe,* 522 U.S. at 346). The court went on to find further that "the historical context points to an understanding that the reservation would no longer continue to exist." *Bruguier* at App. 190.

The South Dakota Supreme Court consistently equated the Yankton Agreement with the Lake Traverse Agreement which disestablished that reservation, finding that "[e]quivalent language [to Articles I and II of the Yankton Agreement] signaled termination of the reservation in *DeCoteau*[.]" *Id.* at App. 181. *Bruguier* further found that "congressional intent to end the Yankton Reservation is sufficiently clear in its 'precisely suited' cession language." *Id.* at App. 189.

***18** *Bruguier* also found a lack of a "jural distinction" between the 1891 agreement at issue in *DeCoteau* and the 1892 Yankton Agreement. *Id.* at App. 195. The court noted the "repeated references" to the Sisseton Agreement during the Yankton negotiations and cited numerous similarities between the two situations: Both Acts sold all unallotted lands; the Acts contained similar preamble language; opened lands on both reservations were subject to the federal homestead and townsite laws; in both instances, the United States retained agency and school lands; and most significantly, no land in common was retained, no boundaries were redefined, and parcels allotted to Indians were in both instances spread randomly across the former reservations. *Id.* at App. 195-96. Accordingly, the court concluded that the "intent" behind the cession language in the 1894 Yankton Act "is unmistakably the same" as that in the 1891 Act that terminated the Lake Traverse Reservation. *Id.* at App. 195. *See also id.* at App. 196 (as in *DeCoteau*, circumstances signaled "congressional intent to terminate the reservation.... We believe the same intent is shown in the Yankton Reservation sale.").[FN6]

FN6. The South Dakota Supreme Court paved the way to *Bruguier* in *Greger, State v. Winckler,* 260

N.W.2d 356, 360 (S.D. 1977) (noting "this court has ruled that the Yankton Indian Reservation was disestablished"); and *State v. Thompson,* 355 N.W.2d 349, 350-51 (S.D. 1984) among other cases.

***19** This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction … is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States,* 500 U.S. 344, 347 (1991). One obvious example is the first round of this case. *Yankton Sioux Tribe,* 522 U.S. at 342 (granting "certiorari to resolve a conflict between the decision of the Court of Appeals and a number of decisions of the South Dakota Supreme Court[.]"). *See also DeCoteau,* 420 U.S. at 430-31. In this instance, *Podhradsky IV* has adopted the *Gaffey II* non-disestablishment ruling as the "law of the case" giving barely a nod to the Supreme Court of South Dakota's decision. *Podhradsky IV,* App. 23 n.7. This ruling entrenched the now well-established conflict.[FN7]

FN7. The Solicitor General on February 25, 2000 recognized that *Bruguier* "wholly disestablished" the reservation. Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *United States v. Matt Gaffey,* No. A-___, p. 5 n.1.

***20** II. The Decision of the Eighth Circuit Conflicts with Decisions of This Court and Established Indian Law Jurisprudence.

A. The Eighth Circuit's Decision Conflicts with *DeCoteau v. District County Court,* 420 U.S. 425 (1975), which *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998), Held To Be Squarely on Point.

This Court has already addressed the consequences of an agreement by a tribe to cede all of its unallotted reservation lands for a sum certain. In *DeCoteau*, this Court held that such an agreement disestablishes the reservation. As night follows day, the same result must obtain with respect to the Yankton Sioux Reservation.

1. As described in *DeCoteau*, the history of the Lake Traverse Reservation followed the same pattern as the Yankton Sioux Reservation. 420 U.S. at 431-44. The Sisseton and Wahpeton bands of the Sioux Nation (like the Yankton Sioux) remained loyal to the United States when the Sioux Nation rebelled. This prompted the United States to enter into a treaty with the Sisseton-Wahpeton Tribe in 1867 which granted the tribe a reservation in the Lake Traverse area. "But familiar forces soon began to work upon the Lake Traverse Reservation [,]" forces which led to the Dawes Act and the allotment of more than 120,000 acres of the reservation. *Id.* at 431, 438 n.19. In 1889, a series of negotiations took place that resulted in an agreement through which ***21** the Sisseton-Wahpeton Tribe agreed to cede - for a sum certain - all the unallotted lands within its reservation. *Id.* at 437. Additional allotments of over 110,000 acres were also provided for. *Id.* at 438 n.19. Two years later, Congress enacted a statute reciting and ratifying the agreement. Act of March 31, 1891, ch. 543, 26 Stat. 1035. In *DeCoteau*, this Court held that " 'the face of the Act,' and its 'surrounding circumstances' and 'legislative history,' all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891." 420 U.S. at 445.

In particular, the Court in *DeCoteau* pointed to the following factors as critical to its decision. First, "[t]he negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands." *Id.* Second, "[t]he Agreement's language, adopted by majority vote of the tribe, was precisely suited to this purpose." *Id.* Third, that "language is virtually indistinguishable from that used in other sum-certain cession agreements ratified by Congress in the same 1891 Act." *Id.* at 446. Fourth, the agreement was distinct from other agreements which the Court held had not changed reservation boundaries. *Id.* at 447-49. And fifth, "[u]ntil the Court of Appeals altered the status quo,

South Dakota had exercised jurisdiction over the unallotted lands of the former reservation for some 80 years." *Id.* at 449.

***22** 2. The pattern of the Sisseton Agreement was followed during the Yankton negotiations. First, as at Sisseton, the negotiations show that the Yankton tribal members were willing to convey all their interest in all their unallotted lands to the Government for a sum certain. *Yankton Sioux Tribe,* 522 U.S. at 344. Second, the language of the Yankton Agreement was adopted by majority vote and was precisely suited to this purpose. *Id.* Third, the Yankton language is virtually indistinguishable from the sum certain agreement ratified at Sisseton. *Id.* Fourth, the Yankton Act is "readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." *Id.* at 345. Fifth, the State assumed "jurisdiction over the [non-Indian lands] almost immediately after the 1894 Act and continuing virtually unchallenged to the present day[.]" *Id.* at 357.

Present day demographics also support disestablishment at Yankton, as they did in *DeCoteou.* 420 U.S. at 428. In Sisseton, about "15% of the land is in the form of 'Indian trust allotments.' " *Id.* At Yankton, about 8.8 percent of the land is in some kind of trust (about 37,600 acres of 430,000). *Podhradsky IV,* App. 5. About 3,000 tribal members and 30,000 nontribal members inhabited the former reservation at Sisseton. *DeCoteau.* 420 U.S. at 428. "[N]on-Indians constitute over two-thirds of the population within the 1858 [Yankton] boundaries." *Yankton Sioux Tribe,* 522 U.S. at 356. This Court thus characterized the Yankton area as " 'predominantly populated by non-Indians.' " *Id.* at 356-57 (citation omitted).

***23** 3. The Eighth Circuit nonetheless held that *DeCoteau* did not control finding that the "circumstances surrounding the negotiation[s]" and "the content and wording of the agreements" were very different. *Gaffey II,* App. 221. The latter point flies directly in the face of this Court's statement in *Yankton Sioux Tribe* that Articles I and II of the two Agreements were virtually identical and that the "terms" of the agreements are "parallel." 522 U.S. at 344.

As to the negotiating history, the Eighth Circuit found that the "background" of the Sisseton-Wahpeton Agreement was "very different … because the tribal members there had expressed their clear desire to terminate their reservation." *Gaffey II,* App. 220-21. Yet, in support of this, the court appears to cite nothing more than a press report (quoted in *DeCoteau,* 420 U.S. at 433), in which Sisseton-Wahpeton tribal spokesmen are reported to have said that "[w]e never thought to keep this reservation for our lifetime." That is a slender reed upon which to rest a fundamental distinction between the Agreements, particularly in light of the Commissioner's understanding that "cession of the surplus lands dissolved tribal governance of the 1858 reservation" and the letter written by three Yankton chiefs and more than 100 members of the Yankton Tribe to the Congress which "indicated they concurred in such an interpretation." *Yankton Sioux Tribe,* 522 U.S. at 353. The letter stated that they

"want[ed] the laws of the United States and the State that we live in to be recognized and observed," and that they did not view it as desirable to "keep up the tribal relation…."

***24** *Id.* (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). It is generally true, as the Eighth Circuit found, "that similar treaty language does not *necessarily* have the same effect when dealing with separate agreements." *Gaffey II,* App. 221 (emphasis added). But "cession and sum certain" language uniquely creates a "presumption" applicable in future cases and thus is necessarily not nearly so malleable as other agreement language. Moreover, the argument of the Eighth Circuit as to the meaning of this language lacks validity when this Court has closely tied two agreements together, as here. 522 U.S. at 344.

4. The district court questioned the identity of the Sisseton and Yankton cases on the ground that this Court could have, but did not, resolve the disestablishment question for the State in its first hearing. *Gaffey I,* App. 311. The basis for this Court's non-resolution of the question is, however, unambiguous: The Court found that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly we decline to do so," and pointed to two questions which warranted "caution" about finally resolving the disestablishment issue. *Yankton Sioux Tribe,* 522 U.S. at 358.

The first question concerned "conflicting understandings about the status of the reservation." *Id.* The South Dakota Supreme Court precisely answered this question in 1999, finding that the "palpable reality" of the reservation's status was that "as the years passed after the 1895 opening, no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the ***25** homesteaders, not the townspeople." *Bruguier,* App. 191; *see City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197, 218 (2005) (noting "longstanding observances" are "prime considerations" in claim to tribal sovereignty). *See also*, 1897 County action recognizing "increase [ ]" in number of townships "by the addition of what was formerly the Yankton Indian Reservation," 2008 SA 366-67; 1897 naming of tribal members to jury lists and as constable, 2008 SA 367-68, 369; 1909 selection of tribal member as Clerk of Courts. 2008 SA 442.

The second point of hesitancy in *Yankton Sioux Tribe* regarded tribal "land in common." 522 U.S. at 358. The Court impliedly demanded more information about whether the Tribe actually retained land in common after 1894. The Court's problem is clear in retrospect. The Tribe's lawyer, at oral argument, incorrectly stated that "there were tribal lands in 1894" and that "[t]here was a mile square they retained for their headquarters." Oral Argument, *South Dakota v. Yankton Sioux Tribe,* 1997 WL 762057 (Dec. 8, 1997), at *41-43. The federal lawyer repeated the error. *Id.* at *48. South Dakota's Attorney General, in rebuttal, explained that "there was no tribal land base left" and "tribal communal ownership was over." *Id.* at *54. The resulting uncertainty, however, obviously concerned the Court, as seen in its opinion. *Yankton Sioux Tribe,* 522 U.S. at 358.

Unrefuted evidence regarding "land in common" on remand confirmed that the Tribe retained no "land in common" after the 1894 Act. *Gaffey II,* App. 229-30; *Bruguier,* App. 185. *See also* Agreement, App. ***26** 339. Indeed, the issue of whether the Tribe *should* retain lands had been raised by John Omaha, a tribal member who, during the 1892 negotiations, proposed that the Tribe "hold" certain "Missouri River bottom" unallotted lands in common, but his plan gained no support from either the tribal or federal negotiators. 1998 JA 172-73. By failing to retain any land in common, "a critical component of reservation status" was lost. *Yankton Sioux Tribe,* 522 U.S. at 346. *See also Bruguier,* App. 185.

B. The Eighth Circuit's Decision to Carve Out Three Categories of "Trust Land" as "Reservation" Land Contravenes This Court's Decisions, Established Indian Law Jurisprudence, and Common Sense.

Having erroneously concluded that the 1892 Yankton Agreement contemplated a continued "reservation," the Eighth Circuit went about determining what particular lands constituted the "reservation." The Eighth Circuit's analysis pivots on 18 U.S.C. § 1151, which defines the term "Indian country" to mean
(a) all land within the limits of any Indian reservation … notwithstanding the issuance of any patent …
(b) all dependent Indian communities …
(c) all Indian allotments, the Indian titles to which have not been extinguished….

***27** Each of the three kinds of "Indian country" is beyond the normal jurisdiction of the State for most purposes. For example, the State lacks criminal jurisdiction over Indians within any area of "Indian country" as defined by

§ 1151. The critical difference between the three types of Indian country for present purposes is that "reservation" land as classified under § 1151(a) holds that status permanently. As *Podhradsky IV* explains, lands which qualify as "reservation" under § 1151(a) have a "considerably more durable" status as Indian country than other lands which qualify as Indian country, in that they "retain their status 'notwithstanding the issuance of any patent,' including a patent which terminated a trust and conveyed the land in fee simple." *Podhradsky IV,* App. 28. On the other hand, allotted lands under § 1151(c) retain their Indian country status, under the very terms of the statute, only so long as the Indian title is "not … extinguished." *See also, id.* The question whether allotted lands under § 1151(c) are also "reservation" under 1151(a) is thus "important" as *Podhradsky IV* specifically finds. *Id.*

The Eighth Circuit held that three types of land within the former boundaries of the Yankton Reservation are "reservation" under § 1151(a). The State disagrees, not only because the entire Reservation was disestablished in 1894, but also because the Eighth Circuit committed fundamental errors of Indian law in analyzing each type of property. These errors exacerbate the negative consequences of the ***28** Eighth Circuit's ruling and increase the need for this Court's review.

1. The largest category of lands held by the Eighth Circuit to be permanent "reservation" under § 1151(a) - over 30,000 acres - is that of lands which remain in allotted status under § 1151(a). *Id.* at App. 34. This ruling is inconsistent with the § 1151 definition of "Indian country" which separately derives each of the three categories of "Indian country" from the common law. *Alaska v. Native Village of Venetie,* 522 U.S. 520, 530 (1998). *Venetie* confirmed that the § 1151(c) category - "Indian allotments, the Indian titles to which have not been extinguished" - is derived from *United States v. Pelican,* 232 U.S. 442 (1914):

Before § 1151 was enacted, we held in three cases that Indian lands that *were not reservations* could be Indian country and that the Federal Government could therefore exercise jurisdiction over them. *See … United States v. Pelican,* 232 U.S. 442 (1914).

….

In *United States v. Pelican,* we held that Indian allotments - parcels of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians - *were* Indian country.

522 U.S. at 528-29 (emphasis added). Indian allotments were "Indian country," but not "reservation," ***29** because they were owned by the federal government for the benefit of individual Indians and because the government exercised jurisdiction over the lands. While this historical definition of allotment was adopted in § 1151, the Eighth Circuit ignored it, finding essentially that the allotments in *this* case had to be "reservation" for the reasons that the "tribal members retained beneficial interest in the allotments" and that the Tribe was "concerned with maintaining a presence on the allotted lands and preserving the support of the federal government and its superintendence over those lands." *Podhradsky IV,* App. 31-32. These are the very qualities that define *allotted* lands - beneficial ownership by the United States for the individual Indian, federal support and superintendence, and tribal jurisdiction until the allotment is surrendered. *Podhradsky IV* negates the well-defined § 1151 categories and the case law supporting them.

Second, the finding that individual "allotments" are freestanding "Indian reservations" is theoretically deficient in another way. The hallmark of "reservation" status is the holding of land in common: at the time of the 1894 Agreement, "tribal ownership was a critical component of reservation status." *Yankton Sioux Tribe,* 522 U.S. at 346. The allotment of land, however, eliminates "any tribal property interest" in the land. Nell Jessup, Editor, *Cohen's Handbook of Federal Indian Law* 195 (2005 ed.). *See also Montana v. United States,* 450 U.S. 544, 559

n.9 (1981) ("throughout the congressional debates, allotment of ***30** Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction"). Indeed, as *Cohen* points out, an "allotment is private property for purposes of fifth amendment takings." *Cohen* at 195 n.439. Congress could not in 1894 have intended to create or maintain "reservations" consisting only of individual parcels of allotted land in which the tribe had no property interest (and "agency land" in which the tribe had no interest, *see infra*, II.B.2), because a critical component of a "reservation," i.e., "tribal ownership" had been surrendered as to all of those very lands.

Third, the finding of the Eighth Circuit that the allotted lands remained "reservation" is flawed in that it ignores the rationale that informed the *DeCoteau* Court - when "cession and sum certain" language is used, reservation status is terminated for *all* lands, at least when all of the unallotted lands are ceded so that the tribe retains no lands in common. *DeCoteau* thus indicates that "exclusive federal jurisdiction" within the extinguished boundaries at Sisseton is "limited to the *retained* allotments," and thus did not extend to extinguished allotments. 420 U.S. at 446 (emphasis added).

There are over 100,000 acres of land in trust within the former Sisseton or Lake Traverse Reservation, most of which are undoubtedly allotments (and not land acquired under 25 U.S.C. § 465 or other statutes). *See* 2007 Ex. 117; *United States Department of the Interior v. South Dakota,* No. 95-1956, Petition for Writ of Certiorari, pages 4, 17 (hereinafter ***31** Petition). There is no reason why the fewer number of allotted acres at Yankton should have "reservation" status while the greater number of allotted acres at Sisseton have been held not to have "reservation" status. The same argument, with more effect, can be made in the areas of the Rosebud and Pine Ridge Reservations which were extinguished even without full cession and sum certain language. *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 603 (1977); *United States ex rel. Cook v. Parkinson,* 525 F.2d 120 (8th Cir. 1975). There are likely half a million acres of allotted lands within the extinguished areas of these two reservations. *See* 2007 Ex. 117; Petition at 4, 17. The allotted land within these extinguished areas is clearly not "reservation" under § 1151(a) and is not treated as such. *See generally United States v. Stands,* 105 F.3d 1565, 1571 (8th Cir. 1997); *State ex rel. Hollow Horn Bear v. Jameson,* 95 N.W.2d 181, 185 (S.D. 1959). Rather, it is treated as § 1151(c) allotted land.

Fourth, it is established law that reservation land does not lose its "reservation" status by virtue of a transfer of a patent. *Seymour v. Superintendent,* 368 U.S. 351, 357-58 (1962). Yet, as even the Eighth Circuit acknowledged, 230,000 acres of the 262,000 acres allotted to Yankton Tribe members (*see Yankton Sioux Tribe,* 522 U.S. at 339) which had been transferred to non-Indians *did lose* their supposed "reservation" status. *Podhradsky IV,* App. 33-34; *Gaffey II,* App. 247. This logically means that none of the "allotted lands" could have been "reservation" lands after the 1894 Act and that the decision of the Eighth Circuit is internally contradictory.

***32** 2. Second, the Eighth Circuit, relying on "law of the case," found the 1,000 acres of "agency land" which had been "ceded" to the United States under Article VIII of the Agreement to be "reservation" under § 1151(a). *Podhradsky IV,* App. 20-21. The categorization of these lands as "reservation" is the unlikely foundation upon which the Eighth Circuit rebuilt a Yankton Reservation. *Id.* The most obvious problem with holding that the agency land "continues to be a reservation" is that it contradicts the holding of *Yankton Sioux Tribe* that "the unallotted lands ceded as a result of the 1894 Act did not retain reservation status." 522 U.S. at 342. Because the agency land was "unallotted" and had been "ceded" to the United States, as the Eighth Circuit acknowledges, it fell within the precise holding of this Court. *See Podhradsky IV,* App. 8-9. *See also DeCoteau,* 420 U.S. at 435 n.16, 438 n.19 (similar lands at Sisseton).

Even if the Eighth Circuit could conceivably undermine this Court's precise holding, it failed to do so. Articles I

and VIII conveyed the agency lands (along with the other unallotted lands) to the United States. Agreement, App. 339, 342-43. At that point, the agency lands passed “free and clear of all of the claims of the Indians,” according to the BIA Solicitor. 1998 JA 571. Lacking tribal ownership, they could hardly have been “reservation” at this time.

Article VIII provided that the lands would be “reserved from sale to settlers until they are no longer needed for [agency, schools and other purposes].” Agreement, App. 343. The Act of February 13, ***33** 1929, 45 Stat. 1167, altered, in part, the function of Article VIII and provided that the lands should be disposed of to the tribe, rather than to settlers, but retained the requirement that disposal could occur only “when they are no longer required for agency, school, or other purposes.” According to the Solicitor, that day arrived by 1934. 1998 JA 572. The mere conveyance to the Tribe, however, failed to give the agency lands the status of “reservation.” *Venetie* finds that in “enacting § 1151 Congress codified” the “requirements” for classification of “ ‘Indian country’ generally” that the lands “must have been set aside by the Federal Government for the use of the Indians as Indian land [and] they must be under federal superintendence.” 522 U.S. at 526-27. Lands do not qualify as any type of “Indian country,” including that of a “reservation” unless they meet, at the minimum, these two requirements. *Id.* at 530; Clay Smith, Chief Editor, *American Indian Law Deskbook* 69-70 (4th ed. 2008). Because the ceded agency lands could be transferred to the Tribe *only* when the government no longer intended to use them for any purpose, they could hardly be argued to be “set aside as Indian lands” and most definitely could not be argued to “be under federal superintendence” when conveyed as a result of the 1929 Act.[FN8]

FN8. This is further confirmed by the Department of Interior's objection to the bill: “It would be a step backward in that it would necessarily limit the jurisdiction of the Federal Government over the reserved area and bring about some undesirable conditions that could not be readily controlled.” 1998 JA 723-24. Agency lands conveyed to the Tribe as a result of the 1929 Act were ultimately reconveyed to the United States in trust. *See* II.B.3, *infra.*

***34** 3. The Eighth Circuit also held that lands acquired in trust within the extinguished boundaries since 1934 - about 6,400 acres - attain “reservation” status by virtue of the 1934 Act. The Secretary can proclaim lands acquired in trust under 25 U.S.C. § 465 and other authority to constitute a “reservation” by following the procedures set forth in 25 U.S.C. § 467. The Eighth Circuit, however, held that, when lands are within the extinguished boundaries of the reservation, the Secretary need not comply with 25 U.S.C. § 467 to create new “reservation,” and that he can do so merely by taking land into trust. *Podhradsky IV,* App. 41-42. This holding is flawed in that it usurps a congressional prerogative. Once Congress has taken down the boundary of a “reservation,” as here, the courts lack the ability to give that extinguished boundary dispositive weight in creating new “reservation” land.

4. Finally, the flawed rationale of the Eighth Circuit apparently converts lands which lost allotted status after the enactment of § 1151 in 1948 into “permanent reservation” and logically means that these fee lands held by non-Indians are today “reservation.” This follows because *Podhradsky IV* found the “distinction” between allotted lands which qualified as “reservation” under § 1151(a) and those which ***35** qualify only as allotments under § 1151(c) to be “important” for the reason that if the allotted lands also qualified as “reservation” they would “retain their status ‘notwithstanding the issuance of any patent, including a patent which terminated a trust and conveyed the land in fee simple.’ ” *Podhradsky IV,* App. 28. *Podhradsky IV* then found the “outstanding allotments” to constitute “reservation” under § 1151. *Podhradsky IV,* App. 51. The practical result appears to be that at least 5,900 acres of former allotted lands which lost that status after 1948 and came into non-Indian ownership within the extinguished boundaries have been declared “reservation.” *See* 2007 Ex. 210. (The State observes that

the Tribe may seek certiorari in *Yankton Sioux Tribe v. United States Army Corps of Engineers,* 606 F.3d 895 (8th Cir. 2010), likely arguing that it is in conflict with *Podhradsky IV* on this issue.)

III. The Issues Raised by This Case Are Important and Recurring.

The decision below merits this Court's review because it so far departs from this Court's prior decisions on a critical issue in Indian law, i.e., when is a reservation "disestablished," and because the decision directly conflicts with the authoritative ruling of the South Dakota Supreme Court. Moreover, the decision of the Eighth Circuit has created an untenable situation for those who must attempt to live in and govern the disputed area and similar areas nationwide.

***36** In the case before this Court, the Eighth Circuit has created roughly 200 "mini-reservations" under § 1151 (a) within the extinguished boundaries of the 1858 reservation. *See* App. 352. Under the rationale of the Eighth Circuit, each of the 200 "mini-reservations" has boundaries cast in stone. *Podhradsky IV,* App. 28. If a tribal member determines to terminate his allotment and sell the land to a non-Indian, and the United States consents, the allotment is extinguished, but the "reservation" status of the land is presumably retained. *Id.*; 18 U.S.C. § 1151(a). The Tribe itself rejected this approach earlier, stating that "drawing a boundary around each parcel of land, or each Indian-owned parcel would result in an absurdity, and realistically cannot be done." Case 4:98-cv-04042-LLP, Doc. 347, filed 10/24/2007, *Yankton Sioux Tribe v. Podhradsky,* Plaintiff's Response to State and County Brief on Status of Reservation Lands and Existence of Boundaries, at 3.

The rule of the Eighth Circuit moreover creates the prospect of thousands or perhaps tens of thousands of such permanent "mini-reservations" nationally because it is commonplace that terminated areas of reservations contain allotted land, and land is often taken into trust under 25 U.S.C. § 465 and other statutes in such areas.

As pointed out above, there are well over half a million acres of allotted land within extinguished areas of reservations in South Dakota; such land is treated today as mere allotted land. The decision of ***37** the Eighth Circuit raises the prospect of new challenges with regard to this land, consisting of claims that the land is not only allotted land under § 1151(c) but is "reservation" under § 1151(a) which retains that status when transferred to non-Indians. Such claims seem inevitable, because there is no characteristic which reliably distinguishes the Yankton cession and sum certain act from the terms of other Acts.

Indeed, a substantial amount of land has left allotted status since 1948 within the extinguished boundaries of the Yankton Reservation; such land is now owned by non-Indians in fee. This 5,900 acres presumably constitutes an "invisible" reservation - not marked on any map in general circulation - and jurisdictional battles between the State and federal courts will inevitably arise.

Nationwide, based on representations of federal authorities, roughly 48,000,000 acres are in allotted status, and 9,000,000 acres have been taken into trust. *See* Petition 4, 17. Land moreover moves from trust to non-trust status at a brisk pace. According to the Government Accountability Office, about 360,000 acres gained trust status nationally in 1997, while 260,000 acres lost trust status. 2007 Ex. 130, at 9 n.8. An unknown, but certainly significant, amount of the land leaving trust status is surely allotted land within extinguished reservation boundaries. In each case, there is now a potential claim that the parcel of former allotted land within extinguished boundaries is itself "reservation" with boundaries.

***38** The practical problem is serious. If the former allotted and trust lands are "reservation," profound jurisdictional consequences attach. Civil and criminal jurisdiction, regulatory authority, and authority with regard to

taxation are all deeply impacted by the determination that land is reservation. *See American Indian Law Deskbook,* at 48, 68-69. In particular, a state loses much of its preexisting jurisdiction over civil causes of action arising on reservations. *See, e.g., Williams v. Lee,* 358 U.S. 217 (1959) (state lacks jurisdiction of claim of non-Indian against Indian for reservation transaction). Similarly, the state's ability to impose various taxes is deeply impacted by reservation status. *See McClanahan v. State Tax Comm'n,* 411 U.S. 164 (1973). Moreover, the courts have found that the state surrenders virtually its entire criminal jurisdiction with regard to incidents involving Indians on reservations. *See American Indian Law Deskbook,* at 158-61. The potentially profound impacts on State, federal, and tribal jurisdiction of the decision below argue for this Court's intervention.[FN9]

FN9. In the alternative to plenary disposition, summary disposition directing further consideration of *Yankton Sioux Tribe* below may be appropriate.

***39** CONCLUSION

The Petition for Writ of Certiorari should be granted.

Daugaard v. Yankton Sioux Tribe

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