NO. __

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,
Cross-Petitioners

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA, SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL.,
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the Act of 1894, ch. 290, 28 Stat. 286, 314-19.

PARTIES TO THE PROCEEDING

Cross-petitioners are the Yankton Sioux Tribe and its individual members.

Cross-respondents are Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; Southern Missouri Recycling and Waste Management District; 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; and Jack Soulek, Member of the Charles Mix County, South Dakota, County Commission.

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OPINIONS BELOW

The amended opinion of the court of appeals is reported at 606 F.3d 994 and reproduced at Pet. App. 1-51.[1] The court of appeals' order on rehearing is reported at 606 F.3d 985 and reproduced at Pet. App. 52-70. The order of the district court is reported at 529 F. Supp. 2d 1040 and reprinted at Pet. App. 122-163.

An earlier opinion of the Eighth Circuit in this case is reported at 188 F.3d 1010 and reprinted at Pet. App. 199-249. The district court's earlier order is reported at 14 F. Supp. 2d 1135 and reprinted at Pet. App. 250-320.

JURISDICTION

The court of appeals entered judgment on May 6, 2010, and denied timely petitions for rehearing and rehearing en banc on September 20, 2010. Pet. App. 321-322. On December 14, 2010, Justice Alito extended the time for filing a petition for a writ of certiorari to January 18, 2011, and the petitions were filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Treaty of April 19, 1858, 11 Stat. 743, is reprinted at Pet. App. 324-36.

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[1] "Pet. App." refers to the appendix to the petition for certiorari in No. 10-929.

The Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 314-319, ratifying the agreement between the Yankton Sioux Tribe and United States is reprinted at Pet. App. 337-351.

The statute defining "Indian country," 18 U.S.C. § 1151, provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian 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.

STATEMENT OF THE CASE

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the Yankton Sioux Tribe's sale of approximately 168,000 acres of reservation land to the United States in 1894 had deprived those acres of reservation status and thereby diminished the reservation. On remand, the parties disputed whether the other 262,300 acres within the original reservation remained reservation land, or whether Congress had completely disestablished the reservation in 1894. The court of

appeals did not fully agree with either party. The court held that Congress did not disestablish the reservation. But it also held that Congress intended in 1894 that subsequent sales of land to non-Indians would further diminish the reservation, and that such sales had caused the reservation to shrink to a fraction of its 1894 size.

When the Eighth Circuit first reached that conclusion years ago, both sides petitioned for review, and this Court denied the petitions. In the ensuing 12 years, the litigation has continued, and the Eighth Circuit has now applied its earlier decision to determine the status of particular parcels. The Tribe has not filed its own petition from that decision because, during the past 12 years, all parties have adjusted to the practical realities on the ground. That makes this Court's review of the Eighth Circuit's fact-bound decision unnecessary, as the Eighth Circuit simply applied its earlier decision in this case and well-established precedents of this Court to specific parcels.

Nonetheless, state and local entities have filed petitions for a writ of certiorari so that they can continue to argue that Congress completely disestablished the reservation in 1894. This Court should deny those petitions. But if it were to grant them, it should also grant this conditional cross-petition so that the Court would not find itself procedurally hamstrung from adopting any of the parties' positions concerning congressional intent and from giving congressional intent its full effect.

Disestablishment or diminishment of a reservation turns on a judgment about congressional

intent — here, the intent of the Congress that enacted the 1894 Act. After this Court's decision in *Yankton*, there are, at least in theory, three possibilities: Congress intended to diminish the reservation only to the extent of the lands it purchased for sale to non-Indians in 1894, as the Tribe has argued; Congress intended further diminishment, as the court of appeals concluded; or Congress intended to completely disestablish the reservation, as petitioners argue. If this Court takes up the question, it should be free to draw whichever of those conclusions it wishes after fully considering the question on the merits. Granting this conditional cross-petition would ensure that the Court would not be procedurally barred from doing so.

As explained below, the same textual and contextual evidence of congressional intent that bears on petitioners' complete disestablishment theory is also relevant to the Tribe's conditional cross-petition. That evidence shows that Congress intended to address only the 168,000 acres of ceded land, and had no intent, much less the requisite clear intent, to affect the reservation status of the remaining lands. Thus, the same evidence that rebuts petitioners' complete disestablishment theory also supports the Tribe's understanding that Congress has not further diminished the reservation. Especially against that backdrop, it would make little sense to determine whether Congress decided to retain a diminished reservation without fully considering the closely interrelated question of what diminished reservation Congress had in mind.

A. Historical Background

1. An 1858 Treaty between the Yankton Sioux Tribe and the United States established the original boundaries of the Yankton Sioux Reservation. Pet. App. 324. The Tribe ceded to the United States more than 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 325.

2. Three decades later, Congress changed policies in the Dawes Act or General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). The Dawes Act reflected a federal policy of opening up lands for settlement, and breaking up reservations into smaller pieces, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. 24 Stat. at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statutes under which such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted. In 1894, the United States reached an

agreement with the Tribe, which Congress ratified in the Act of August 15, 1894 ("1894 Act"), ch. 290, 28 Stat. 286, 319, to purchase those unallotted acres for $600,000. *See* Pet. App. 337-351. The Tribe thereby agreed to surrender approximately 168,000 unallotted acres from its 430,405-acre reservation, leaving approximately 262,300 acres of allotted lands. Article VIII of the agreement required the United States to set aside from sale to non-Indians 1,000 acres of the ceded land for "agency, schools, and other purposes" for the support of the Tribe. *Id.* at 342-343.

3. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had duly expired, "left many Indians landless." *Id.* at 11. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "'cultural resilience.'" *Id.* The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation that it held in trust. *See id.* at 10 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than opening the 1,000 acres of reserved agency trust lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), extended those policies. In addition to putting an end to further allotment and

extending the trust periods for outstanding allotments indefinitely, the IRA authorized the Secretary of the Interior to acquire additional lands in trust to create or add to tribal reservations. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. Pet. App. 12.

B. Procedural Background

1. This cross-petition involves the proceedings on remand from this Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). In *Yankton*, this Court held that the Tribe's cession of 168,000 acres of unallotted lands to the United States had diminished the original 1858 reservation. *See id.* at 345. The Court then concluded that, because a proposed waste site lay on ceded land, it was not within the diminished reservation and therefore not subject to federal environmental regulation. *Id.* at 340, 358.

This Court did not reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court pointed to Article VIII, which required the United States to reserve lands "for agency, schools, and other purposes," and observed that it was "'difficult to imagine'" why Congress would have reserved such agency trust lands "'if it did not anticipate that the opened area would remain part of the reservation.'" *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The

Court further noted that Article XVII, which prohibited the sale of liquor on ceded lands or other lands within the reservation, "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, and after the case was consolidated with another one concerning the reservation's boundaries, the district court conducted an evidentiary hearing and held that the 1894 Act diminished the reservation only insofar as the Tribe had ceded the unallotted lands for sale to non-Indians in 1894. *See* Pet. App. 250-320. The court reasoned that nothing in the language of the agreement supported complete disestablishment of the reservation, whereas several articles strongly indicated that a diminished reservation would persist. *See id.* at 287-304.

The district court also relied on the context of the Act. Reports of the government's negotiations with the Tribe, the court observed, "memorialized only the consent of the Tribe to sell the surplus [unallotted] lands"; they did not discuss complete disestablishment or further diminishment beyond the unallotted lands. *Id.* at 276. Representations by the Commissioners who negotiated the agreement further suggested that the Tribe would retain independent powers of self-government over the lands it did not cede. *See id.* at 276-281. Based on the evidence, the court concluded that the Yankton Sioux Reservation consists, in diminished form, of all land "within the original exterior 1858 Treaty boundaries" that the Tribe did not cede to the United States in the 1894 Act, as well as the agency trust

land that the Act specifically reserved from sale. *Id.* at 316.

The Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *See id.* at 199-249. The court of appeals agreed that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 240-243. At a bare minimum, the Eighth Circuit noted, the agency trust lands — which the United States returned to the Tribe in 1929 — remain part of the reservation. *Id.* at 241. The court of appeals disagreed, however, with the Tribe's argument that the original reservation had been diminished only with respect to the ceded lands; rather, the court found the reservation further diminished by subsequent sales of allotted lands to non-Indians — lands that, according to the court, Congress in 1894 "foresaw would pass into the hands of the white settlers and homesteaders." *Id.* at 243.

Both the State and the Tribe sought certiorari, with the State maintaining its total disestablishment position and the Tribe maintaining the position on which it had prevailed in the district court — namely, that the reservation had not been further diminished by sales of allotted lands to non-Indians. The United States opposed certiorari, noting the absence of a clear split and the interlocutory posture of the case. Nonetheless, the United States stated that it "agree[d] with the Tribe" that the reservation has not been further diminished. U.S. Br. in Opp. (Nos. 99-1490, 99-1683) at 21. The United States also noted that, if the Court were to grant certiorari, it should "grant both petitions, in order to ensure that it has before it the full range of issues going to both diminishment and

disestablishment of the Reservation." *Id.* at 27 n.10. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. On remand, the district court held that various trust lands within the original 1858 boundaries maintained reservation status: (1) agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) lands allotted to individual Indians that remain in trust today; (3) lands additionally taken into trust under the 1934 IRA; and (4) lands allotted to individual Indians that are still owned in fee by Tribe members but not held in trust. *See* Pet. App. 122-163.

On appeal, the Eighth Circuit largely affirmed. *See id.* at 1-51. The court of appeals held that the diminished reservation included (1) agency trust lands, (2) allotted lands that remain in trust, and (3) lands taken into trust under the 1934 IRA. *Id.* at 51. The court found further that nearly 175 acres of miscellaneous lands acquired in trust under authorities other than the IRA qualify as dependent Indian communities under the definition of "Indian country" in 18 U.S.C. § 1151(b). *Id.* at 42-43. But the court of appeals vacated the district court's holding that allotted fee lands continuously owned by Indians but not held in trust are also Indian country, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 46.

4. The State defendants, County defendants, and Southern Missouri Recycling and Waste Management District filed petitions for certiorari

seeking review of one issue: whether the 1894 Act wholly disestablished the Yankton Sioux Reservation.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the 12 years since the Eighth Circuit's earlier decision on which this Court denied certiorari, the practical reality on the ground has adjusted to reflect the Eighth Circuit's basic ruling. For that reason, and others, the Tribe has decided not to file its own petition for certiorari as it did 11 years ago. The Tribe's brief in opposition outlines the reasons this Court should decline to review the Eighth Circuit's fact-bound decision. If this Court were to grant the pending petitions, however, it should also grant this conditional cross-petition so that it could fully assess and apply Congress's intent.

When Congress enacted the 1894 Act, it could, at least in theory, have intended one of four consequences: (1) to leave the 1858 reservation intact; (2) to diminish the reservation only to the extent of the unallotted lands it purchased from the Tribe for sale to non-Indian settlers; (3) to diminish the reservation further; or (4) to disestablish the reservation entirely. This Court already rejected the first of those alternatives, and the third and fourth would be options for the Court if it granted the petitions. This conditional cross-petition puts the other remaining option squarely before the Court, so that it would not be procedurally barred from reaching any of the possible conclusions about congressional intent or the current bounds of the reservation.

1. The petitions and this conditional cross-petition all rely on overlapping evidence of congressional intent. "The first and governing principle is that *only Congress* can divest a reservation of its land and diminish its boundaries," and "[o]nce a block of land is set aside for an Indian reservation … the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis added). Moreover, Congress's intent to diminish a reservation must be "clear and plain," *United States v. Dion*, 476 U.S. 734, 738 (1986), meaning that it must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Accordingly, the "'most probative evidence'" of either disestablishment or diminishment is "'the statutory language used to open the Indian lands,'" as well as "'the historical context.'" *Yankton*, 522 U.S. at 344 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)).

Petitioners have attempted to support their total disestablishment theory with the 1894 Act, reports of the Yankton Indian Commission that negotiated the agreement, and the legislative history and negotiations surrounding the agreement. *See, e.g.*, Pet. App. 229-230. The Tribe has relied on those same sources in arguing for the conclusion that Congress intended to preserve the reservation except with respect to the lands the Tribe ceded for sale to non-Indians.

The district court — in agreement with the Tribe — found "strong textual and contemporaneous evidence … establishing that the Yanktons' allotted lands retained reservation status." *Id.* at 307. For

example, Article V of the 1892 agreement provides for the continued funding of tribal courts of justice and other local institutions, consistent with the continuing reservation status of allotted lands. *Id.* at 340-341. Because that provision reflects an expectation that the Tribe would maintain a sovereign existence, it "counsel[s] against finding the reservation terminated." *Yankton*, 522 U.S. at 350. Similarly, Article VIII reserves from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes." Pet. App. 342-343. As this Court already determined, it is "difficult to imagine" why Congress would have reserved lands for that purpose "if it did not anticipate that the opened area would remain part of the reservation." *Yankton*, 522 U.S. at 350 (quoting *Solem*, 465 U.S. at 474).

This Court further noted in *Yankton* that certain Articles of the Act "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.* at 350. The liquor prohibition in Article XVII prohibits the sale or offering of "intoxicating liquors" on "any of the lands by this agreement ceded and sold to the United States" or "any other lands *within or comprising the reservations of the Yankton Sioux* or Dakota Indians as described in the [1858] treaty." Pet. App. 347 (emphasis added).

The context of the Agreement further supports the conclusion that Congress did not intend to affect the reservation status of non-ceded lands. In the negotiations leading up to the 1894 Act, the parties "did not discuss the future boundaries of the reservation or the relinquishment of the entire reservation by the Tribe, but memorialized *only the*

consent of the Tribe to sell the surplus lands remaining after the allotment process was completed." *Id*. at 276 (emphasis added). As Commissioner Cole represented to the Tribe at the first council meeting: "The Great White Father … wants to give you a chance to sell your surplus lands …. *He does not want you to sell your homes that he has allotted to you*. He wants you to keep your homes forever. *He only wants you to sell your surplus lands* for which you have no use." Report of the Yankton Indian Commission (Mar. 31, 1893), S. Exec. Doc. No. 27, at 49 (emphases added). Similarly, Commissioner Adams noted, "We understand that you each received an allotment of land on which to make a home…. We also understand that you own, outside of your allotments, a large quantity of land in common. It is this land that you own in common that we were appointed by the Great Father to talk to you about." *Id.* at 48; *see also id.* at 81 (Commissioner Cole asked the Tribe to accept "the sale of the surplus lands and the *opening of this reservation to white settlement*," not disestablishment of the reservation) (emphasis added).

Each of those statements reflects a targeted intent to negotiate only the sale of the unallotted lands, without affecting the other reservation lands. Indeed, "[a]t no point in the Commissioners' reports is there any mention by a commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." Pet. App. 284.

When the Commissioners submitted the agreement to Congress, they again confirmed that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it." *Id.* at 236 (quoting S. Exec. Doc. No. 27, at 13). The preamble to the 1894 Act similarly recites that the Tribe "is willing to dispose of *a portion* of the land set apart and reserved to said tribe" in 1858. *Id.* at 338 (emphasis added). As the district court noted, that provision reflects congressional intent to accept the will of the Tribe to sell only a portion of its reservation, not to disestablish or diminish the remainder. *Id.* at 148-150.

That interpretive evidence not only refutes petitioners' total disestablishment position, it also supports the Tribe's view that Congress did not diminish the reservation beyond the cession of unallotted lands for sale to non-Indians. At this juncture, of course, the question of who has the better of the argument based on those sources is beside the point. The critical point is that the same basic sources are relevant to the issues raised in the petitions and this conditional cross-petition. If the Court were to grant the petitions, there would be no reason to truncate either the inquiry into legislative intent or the relief available — *i.e.*, there would be no reason to grant the petitions and not this conditional cross-petition.

2. The lower courts recognized the relationship between petitioners' arguments concerning disestablishment and the Tribe's argument. *See, e.g., id.* at 33-34; *id.* at 226-227. The United States, for example, has argued that the conclusion that the "Reservation continues to encompass all lands that

were not ceded … was supported by the fact that nothing in the explicit language of the 1894 [Act] supports disestablishment." U.S. CA8 *Gaffey* Br. at i.

In this Court, petitioners argue that the court of appeals' decision is "internally contradictory" to the extent that it concludes that the reservation was not disestablished but does not include *all* allotted acres, because, petitioners argue, private sales of allotted lands cannot deprive those lands of reservation status. State Pet. 31; *see also* County Pet. 21-22; S. Mo. Recycling & Waste Mgmt. Dist. Pet. 9-10. That is not necessarily true, as the Tribe explains in its brief in opposition. But petitioners' all-or-nothing approach confirms the close relationship between the questions presented in the petitions and this conditional cross-petition. Petitioners certainly ought not be able to argue both that the court of appeals' middle-ground position is untenable and that this Court should not consider the other alternative position.

3. For these reasons, if this Court were to grant the petitions, it should also grant this conditional cross-petition to ensure that its consideration of the full range of issues and remedies is unfettered and to eliminate any risk that it would face a procedural bar to deciding the case in accordance with its own view of Congress's intent in the 1894 Act. There is no reason for this Court to limit its options to such an extent that, following full briefing and consideration on the merits, the Court would have no choice but to consider only the State's disestablishment position, and the result reached by

the court of appeals, but not the other remaining view of Congress's intent.

CONCLUSION

This Court should deny the petitions for a writ of certiorari in Nos. 10-929, 10-931, and 10-932. But if this Court were to grant those petitions, it should also grant this cross-petition.

Respectfully submitted,

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