No. 10-1059

In The Supreme Court of the United States

YANKTON SIOUX TRIBE,
AND ITS INDIVIDUAL MEMBERS,

Petitioners,

v.

UNITED STATES ARMY
CORPS OF ENGINEERS, ET AL.,

Respondents.

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

BRIEF OF RESPONDENTS STATE OF SOUTH DAKOTA, AND JEFF VONK, SECRETARY OF THE DEPARTMENT OF GAME, FISH AND PARKS

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STATUTORY PROVISION INVOLVED

In addition to the statutes identified by the Petition[1] at 1-2, the following provisions are integrally at issue:

The Treaty with the Yankton Sioux, 1858, ratified, 11 Stat. 743 (1859) is reprinted at Pet. App. No. 10-929 at 325-36.

The Agreement with the Yankton or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at Pet. App. No. 10-929 at 337-51.

18 U.S.C. § 1151 which defines "Indian country" states:

> 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

[1] The petition filed under No. 10-1059 will be referred to as "the Petition." All references to the other petitions filed in this disestablishment litigation will be identified by their assigned case number. The term "Pet." refers to the Petition. The term "Pet. App." refers to Petitioner's Appendix. The term "2002 CR" refers to the document number in the District Court Clerk's Record. The term "T. App." refers to the Tribe's Appendix in the Eighth Circuit below. References to "SA" refer to the State's Appendix in the Eighth Circuit below. "Pet. App. No. 10-929" refers to the Appendix to the State's Petition No. 10-929. (These citations are provided as a convenience.) Collective references to the petitions in Nos. 10-929, 10-931, 10-932, and 10-1058 will be referred to as "the lead disestablishment petitions."

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

The Petition accurately describes this matter as a "companion" case to the petitions for writ of certiorari filed by the State, local governments, and Southern Missouri Waste Management in Nos. 10-929, 10-931, and 10-932, as well as the Tribe's Conditional Cross-Petition, No. 10-1058. All the petitions, including this one, revolve around the issue of whether the 1858 Yankton Sioux Reservation has been disestablished. *See* Pet. 2-3. The specific land at issue in the Petition is a fragment of the land at issue in the lead disestablishment petitions. The Tribe claims in this case that 1100 acres were improperly transferred to the State pursuant to the Water Resources Development Act of 1999 ("the WRDA"), Pub. L. 106-53, 113 Stat. 269, as amended by Pub. L. 106-541, § 540, 114 Stat. 2572 (2000). The WRDA allows only land "outside the external boundaries of a reservation of any Indian tribe" to be transferred to the State. *Id.*; §§ 605(b)(3),

605(c)(1)(B).[2] The Petition argues that the 1100 acres at issue are within the "external boundaries" of the Yankton Sioux Reservation and therefore the land transfer was invalid. Pet. 3. But in order for the lands at issue to be located within the "external boundaries" of a reservation, this Court would not only have to grant both the State's Petition No. 10-929 and the Tribe's Conditional Cross-Petition No. 10-1058, but it would have to adopt virtually all of the Tribe's theories. This outcome would be, we respectfully submit, inconsistent with this Court's opinion in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

In confronting this claim, the Eighth Circuit quoted its earlier opinion for the proposition that the "Reservation was diminished 'by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.'" *Yankton Sioux Tribe v. Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010) *(COE II)*; Pet. App. 9 (quoting *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) *(Gaffey II)*; Pet. App. No. 10-929 at 247). *COE II* held that because certain of the land at issue had been transferred out of Indian hands to non-Indians before passage of the 1944 Flood Control Act (the FCA), 58 Stat. 887, it had lost "reservation" status before it was transferred to the State by virtue of the WRDA. Pet. App. 6-8. The remainder, "a few tracts," had been acquired by condemnation after the FCA's enactment, and in this way, also passed out of Indian hands,

[2] The Eighth Circuit referred to the WRDA § 605(c)(2) which Congress redesignated as § 605(c)(1)(B) in the 2000 amendments. *COE II*, Pet. App. 4-5.

losing reservation status. Pet. App. 8-10. The transfer of the land to the State was therefore upheld. *COE II*, Pet. App. 10.

The State does not dispute that the former allotted lands at issue are not "reservation" today. The State asserts that the Reservation has been entirely disestablished and no reservation, as defined by 18 U.S.C. § 1151(a), remained after enactment of the 1894 Act. *See* State's Petition No. 10-929. Therefore, the lands in question were necessarily "outside the external boundaries of a reservation" in 2002 when transferred. Nonetheless, the State does not oppose the request to hold this Petition in abeyance until a decision regarding the lead disestablishment petitions is made, in order to fairly present the matter. The State agrees with the Tribe that this case is "inextricably intertwined" with the lead disestablishment cases. Pet. 12. Nonetheless, as demonstrated below, this case can be decided in the State's favor even if disestablishment is not found.

A. Historical Context: The Yankton Sioux Reservation and Litigation Regarding Its Status.[3]

1. Background of the Reservation.

The original boundaries of the Reservation were established in 1858 and encompassed 430,405 acres.

[3] More detail about the history can be found in the State's Petition No. 10-929 at 5-16.

Yankton Sioux Tribe, 522 U.S. at 334. After Congress passed the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, each member of the Tribe received a 160-acre allotment from the then-existing Reservation. *Yankton Sioux Tribe*, 522 U.S. at 335-36. By 1892 roughly 262,000 acres had been allotted pursuant to the Act and a subsequent act. *Id.* In 1894, the Tribe ceded all the remaining unallotted acres (approximately 168,000 acres) to the United States for a "sum certain" of $600,000. *Yankton Sioux Tribe*, 522 U.S. at 337-38; Agreement Art. I, II, Pet. App. No. 10-929 at 339. The Tribe did not retain any land in common. *Gaffey II*, 188 F.3d at 1023; Pet. App. No. 10-929, 229-30. Tribal members quickly disposed of their allotments and by 1930, individual Yankton Indians owned only 43,358 acres. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By 1995, 232,000 of the original 262,000 allotted acres had been transferred in fee to non-Indians. *See Yankton Sioux Tribe*, 522 U.S. at 339.

2. Course of the Litigation Regarding Disestablishment and Diminishment of the Yankton Sioux Reservation.

The battle over whether the reservation had been disestablished arose when the Tribe claimed jurisdiction over the construction and operation of a solid waste facility on land ceded to the United States in 1894. This Court found that lands ceded to the

United States in 1894 were no longer "reservation" or "Indian country." *Yankton Sioux Tribe*, 522 U.S. at 358. It further found the external boundaries were removed by the 1894 Act. *Id.* at 345-48. However this Court did not resolve the ultimate claim of "disestablishment." *Id.* at 358.

Extensive litigation followed this Court's decision. *See Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998) *(Gaffey I)*; Pet. App. No. 10-929 at 250-320; *Gaffey II*, 188 F.3d 1010 (8th Cir. 1999); Pet. App. No. 10-929 at 199-249; *South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007) *(Podhradsky I)*; Pet. App. No. 10-929 at 122-163; *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) *(Podhradsky II)*; Pet. App. No. 10-929 at 71-121; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) *(Podhradsky III)*; Order on Petitions for Rehearing; Pet. App. No. 10-929 at 52-70; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) *(Podhradsky IV)*; Pet. App. No. 10-929 at 1-51.

The final Eighth Circuit opinion relies on the "law of the case" in *Gaffey II* for the proposition that the Reservation was not disestablished. *Podhradsky IV,* 606 F.3d at 1004; Pet. App. No. 10-929 at 20-25. A "reservation" was found within the extinguished boundaries and consisted of three types of land: (1) 30,051.66 acres of allotted trust lands, or lands which have been continuously in allotted status; (2) 913.83 acres of agency trust lands; and (3) 6444.47 acres of lands acquired in trust under the 1934 IRA. *Podhradsky IV*,

606 F.3d at 1001, 1017; Pet. App. No. 10-929 at 12-13, 51. This constituted roughly 200 non-contiguous parcels.

Podhradsky IV also found that § 1151 separated the "concept of jurisdiction from the concept of ownership." 606 F.3d at 1007; Pet. App. No. 10-929 at 27. Prior to 1948 and the enactment of § 1151, allotted lands within the former boundaries which lost allotted status when sold to non-Indians, also lost their characteristics as reservation and "Indian country." *See* 606 F.3d at 1007-1008; Pet. App. No. 10-929 at 27-28. But according to *Podhradsky IV*, after the enactment of § 1151 allotted lands within the former boundaries still qualify as "reservation" under § 1151(a), and retain their "reservation" and "Indian country" status even when the allotted status is surrendered. *See id*. at 1007-1008, 1017; Pet. App. No. 10-929 at 27-29, 50. At least 5900 acres of allotted lands have lost allotted status since 1948 – these lands are now owned by non-Indians. *See* 2007 Ex. 210. The Eighth Circuit's decision creates permanent "reservation" status for each parcel of allotted land and each parcel of post-1948 former allotted land within extinguished boundaries regardless of whether it is owned in fee by a non-Indian – a concept never before seen in Indian law jurisprudence.

B. Lands Directly at Issue – Background and Prior Litigation.

1. The Flood Control Act and the Acquisition of the Lands by the Army Corps of Engineers.

The lands at issue were acquired by the United States Army Corps of Engineers (the Corps) for the construction of mainstem reservoirs authorized by the FCA. *COE II*, Pet. App. 4. Except for a 40 acre parcel which had "apparently" been "ceded" to the United States in 1894, the 1100 acres had been "allotted to individual members of the Tribe." Pet. App. 6, & n. 3. Most of the originally allotted lands, roughly 900 acres, were in non-Indian ownership when purchased by the Corps. T. App. 198-199, 212-218.

Roughly 201 acres of the land, however, were held in allotted trust status when acquired by the Corps in the late 1940s. *Id.* The allotted lands, held by individual Indians, were the subject of "condemnation proceedings some sixty years ago," in United States District Court. *COE II*, Pet. App. 8. The "Bureau of Indian Affairs did not oppose condemnation." *Id*. Rather, the BIA "negotiated appropriate compensation for the Indian allottees." *Id*. "[E]ach allottee signed a Consent to Transfer of Lands acknowledging that, in exchange for specified compensation, 'absolute fee title will be conveyed to the United States . . . by court decree[.]'" *Id*. After "final condemnation orders" were entered, the Attorney General of the

United States issued a letter to the Secretary of the Army stating "'valid title to the above tract is vested in the United States in fee simple.'" *Id*. The Tribe conceded "that the United States of America held fee simple title to these tracts when the WRDA was enacted, and when the Corps transferred them to the State." *Id*.

2. Transfer of These Lands to the State.

The Corps had acquired excess lands for construction of reservoirs and the WRDA provided these lands should be conveyed to the State, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe to provide for fish and wildlife and public recreation. *See generally*, *COE II*, Pet. App. 4. The excess lands could be conveyed to the State, but only when "'located outside the external boundaries of a reservation of any Indian tribe.'" *COE II*, Pet. App. 4.

The Acting Regional Director of the BIA, Cora L. Jones, determined on November 17, 2000, that the lands at issue in this case, "do not lie on trust land, are not within current reservation boundaries, and do not seem to be in areas designated as the Great Sioux Reservation in the Fort Laramie Treaty of 1868." T. App. 547-548. The Corps followed by publishing a statement in the Federal Register in 2001, a finding that the lands in question are "located outside the external boundaries of the reservation of an Indian

tribe." 66 Fed. Reg. 11,008 (Feb. 21, 2001); SA 93. On January 26, 2002, the North Point and White Swan recreation areas, among others, were transferred by quit claim deed to the State. T. App. 709-717.

3. Prior Litigation in this Case.

a. Litigation in the District Court.

Three complaints were filed in this action. The first, filed in 2002, did not argue that the land was within a "Yankton Sioux Reservation" or that the WRDA prohibited the transfer of the land to the State. 2002 CR 1. Rather, the complaint alleged environmental and cultural preservation issues which were later resolved. *Id*. The second complaint, filed in 2004, claimed for the first time "reservation" status for the North Point and White Swan lands. *See* 2002 CR 165. The complaint further asserted the transfer of the lands to the State was invalid under the WRDA because the lands were within a "reservation." *Id.* The third complaint, filed in 2007, added two additional areas – the Visitor's Center and Spillway Recreational areas – to the dispute. 2002 CR 279.

The district court resolved the question of whether the transfer of lands to the State was valid on the basis of its own prior ruling in the lead disestablishment litigation. The district court found that its

decision in *Podhradsky I* eliminated "any possibility that the Tribe can prevail" because the land at issue "does not fall within any of the four categories of land which the Court held" constitute the Yankton Sioux Reservation. *COE I*, Pet. App. 29. There was no remaining controversy because the Tribe had admitted that the Corps had held the "'title to the lands from the time they were acquired from their original Indian owners up to the enactment of'" the WRDA. *Id.*

The Tribe's complaints with regard to the Spillway Recreation area and the Visitors Center were declared moot, with the court adding that "[e]ven if these two areas were transferred to the State, which the Court does not find they were, those lands are not within any of the four categories of land" constituting the Yankton Sioux Reservation. *COE I*, Pet. App. 29.

b. Litigation in the Eighth Circuit.

COE II found the reservation had been diminished "'by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.'" *Id.* at 9 (quoting *Gaffey II*, 188 F.3d at 1030; Pet. App. No. 10-929 at 247). The Tribe argued, in effect, that while that rule may apply to transfers of allotted lands to non-Indians (here the 900 acres of lands which were in non-Indian hands before the COE acquired them), it did not apply to land transferred to the United States by condemnation (here the 200 acres) as the United States was not a "'white

settler [or] homesteader[.]'" *COE II*, Pet App. 9. The Eighth Circuit held that the rule was "not so limited" and applied to transfers of allotted lands from tribal members to the United States, as well as transfers of allotted lands to non-Indian homesteaders. *Id*. Therefore, because all of the land at issue had passed out of allotted status into non-Indian hands, the land was not "reservation" or within a "reservation" and the entire transfer was valid.[4] *Id*. at 10.

DISCUSSION

The State agrees with the Tribe that this Petition and the lead disestablishment petitions are closely related and therefore it is practical to hold this Petition until resolution of the lead disestablishment petitions. If the Court grants the lead disestablishment petitions and finds the Reservation entirely disestablished, it follows that this Petition is without merit and should be denied. However, even in the absence of finding the Reservation wholly disestablished, the *COE II* decision can be upheld, as demonstrated below.

[4] *COE II* noted that given its "broader rejection of the Tribe's claims," it did not need to address the lease of the "spillway claim." *COE II*, Pet. App. 5, n. 2.

A. As the Yankton Sioux Reservation has been disestablished, the lands in question were not within the "external boundaries" of a reservation when transferred to South Dakota in 2002.

Petitioner's central assertion is that the transfer to the State of the lands in question violated the WRDA because the land was within the "external boundaries" of a reservation. As the State demonstrates in its Petition No. 10-929, the Reservation was entirely disestablished by virtue of the Act of 1894. Therefore the transferred lands could not have been within the "external boundaries" of a reservation. *Yankton Sioux Tribe* found that the "'cession' and 'sum certain' language [of the 1894 Yankton Act] is 'precisely suited' to terminating reservation status." 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). This Court further found that 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." *Yankton Sioux Tribe*, 522 U.S. at 344. This, together with the additional arguments in the State's Petition No. 10-929, establishes that the Reservation was disestablished as of 1894.

B. Even if the Yankton Sioux Reservation was not disestablished, the Eighth Circuit should be upheld.

Even if the State's disestablishment argument is not sustained, the Corps' transfer of the recreation lands to the State was valid on other grounds and the Eighth Circuit's decision can be upheld.

1. The transfer of lands from allotted status deprived the land of any Indian country or reservation status.

The Eighth Circuit in *COE II* relied on *Gaffey II*, for the proposition that the external boundary of the Reservation had been eliminated but that each parcel of trust land had its own reservation boundary. Pet. App. 3-4, 6-7. Further, following *Gaffey II*, it found that the reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *COE II*, Pet. App. at 9 (quoting *Gaffey II*, 188 F.3d at 1030; Pet. App. No. 10-929 at 247). Because all 1100 acres of the former allotted lands had been transferred to non-Indians, none were "reservation". Under the theory of *Gaffey II*, as followed in *COE II*, the external reservation boundary was eliminated, and the only reservation boundaries were around individual parcels of trust land. *See generally*, Pet. App. 6, n. 4. Therefore, the 1100 acres could not be within a "reservation" under any theory and the transfer was valid.

The State is nonetheless obligated to identify a stumbling block. As noted, *Podhradsky IV* found outstanding allotments retain "reservation" status under 18 U.S.C. 1151(a); 606 F.3d at 1007-1008, 1017; Pet. App. No. 10-929 at 27-28, 50-51. *Podhradsky IV* reasons that after the enactment of § 1151 in 1948, "reservation" lands would "retain their status" as "reservation" notwithstanding the issuance of a fee patent. *Id.* at 1007-1008; Pet. App. No. 10-929 at 28. In other words, after 1948, allotted lands transferred to non-Indians *did* retain reservation status. While the Eighth Circuit appeal was pending, the United States identified "at last one trust parcel (B-64)" which was condemned "after June 25, 1948." United States Motion to Hold Appeal in Abeyance, *Yankton Sioux Tribe v. United States Amy Corps of Engineers*, Appeal No. 08-2255 (filed November 2, 2009). *See also* T. App. 305 ("DOJ did not file a condemnation action against the land [Tract No. B-64] until May 1949"). (It is of interest that neither the Tribe nor the United States mentioned this in their submissions.)

In any event, if *Podhradsky IV* means what it says, then *COE II* presumably could not have found this parcel validly transferred because it would have retained its "reservation" status. The tension between the Panels provides a reason, in addition to the more weighty reasons discussed in the State's Petition No. 10-929, to grant certiorari in that case. *See e.g.*, *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n. 5 (2003) (noting grant of certiorari addressing question on which the Ninth Circuit Panels (in addition to

other circuits) had "expressed divergent views."); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (noting limited grant of certiorari "because of this intracircuit conflict").

2. The Yankton Sioux Reservation's "external boundaries" had been extinguished.

Even if the reservation was not disestablished, the recreation lands were not within the "external boundaries" of a reservation given the terms' natural meaning. This Court has found "[i]n the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). The natural meaning of an "external boundary" is an actual, existing and discernable outer boundary line. *See generally, Gibbons v. Ogden*, 22 U.S. 1, 74 (1824). However, according to *Yankton Sioux Tribe*, the Reservation had lost its external boundary as this "boundary line" was extinguished in 1894. 522 U.S. 345-48; *Gaffey II*, 188 F.3d at 1013, 1021, 1030; Pet. App. No. 10-929 at 203, 223, 224, 248. As there were no external boundaries, the Tribe's claim that the recreation areas were "within the external boundaries of a reservation" is without merit.

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CONCLUSION

While not agreeing this case cannot separately be resolved and affirmed, the State does not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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