No. 10-931

In The
Supreme Court of the United States

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, a political subdivision of the State of South Dakota,

Petitioner,

v.

YANKTON SIOUX TRIBE AND UNITED STATES OF AMERICA,

Respondents.

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.

LIST OF PARTIES

The caption of the case contains the names of all the parties to the proceeding, except Dennis Daugaard, Governor of South Dakota; Marty J. Jackley, Attorney General of South Dakota; 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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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays 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) and is reprinted in the Appendix (App.) at 1-51. The Eighth Circuit issued an Order on Petitions for Rehearing, reported at *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) 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) 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) and is reprinted at App. 122-163. The earlier opinion of the Eighth Circuit is reported at *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) and is reprinted at App. 199-249. The Memorandum 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) 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. 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. 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. 324-336.

The Agreement with the Yankton Sioux or Dakota Indians, in South Dakota, 1892, ratified, 28 Stat. 286, 314 (1894) is reprinted at App. 337-351.

INTRODUCTION

Southern Missouri Recycling and Waste Management District, formerly known as the Southern Missouri Waste Management District, hereinafter

SMRWMD, operates a Sub-Title "D" landfill located in Charles Mix County, South Dakota. Originally formed in February, 1992, its members included four counties, twenty-one municipalities and the Yankton Sioux Tribe. A site was chosen for the landfill and construction, completion and successful operation of the landfill has subsequently followed. In July 1993, after an abrupt change in the leadership of the political body of the Yankton Sioux Tribe, the tribe withdrew from the SMRWMD and then subsequently sued SMRWMD seeking to stop construction of the landfill arguing that it was sited within the limits of the boundaries of the Yankton Sioux Reservation and additionally seeking regulatory control. The trial court ruled in favor of the Tribe. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878 (D.S.D. 1995). On appeal, a divided panel affirmed the trial court. The United States Supreme Court unanimously reversed, holding that lands ceded to the federal government by the Tribe were no longer in Indian country and the Tribe's boundary had been diminished. *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998). The United States Supreme Court commented on the possible disestablishment of the reservation, stating: "We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.,* 805. An Order was issued by the Circuit Court of Appeals for the Eighth Circuit and the case was . . . "remanded to the United States District Court for the District of South Dakota for further proceedings in conformity with the

opinion of the Supreme Court of the United States. . . ." *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 141 F.3d 798 (1998). The Tribe then commenced a suit against Charles Mix County officials seeking an injunction. The District Court consolidated the two cases and issued its ruling in *Yankton Sioux Tribe v. Gaffey*, 188 F. Supp. 2d 1135 on August 14, 1998.

Since the landfill was located on "ceded" lands and thus not part of the Yankton Sioux Reservation, SMRWMD participated less actively in the case thereafter, but kept abreast of the issues and rulings.

In 2007, the district court, on remand in *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007), ruled that 37,600 acres of trust land, some of which was heretofore considered Indian country under 18 U.S.C. § 1151(b) & (c), has reservation status. That is, that Congress intended that the approximately two hundred individual parcels of land held in trust have a boundary around them and are to be considered as Indian country under 18 U.S.C. § 1151(a), for now and forever.

On appeal, the Court's reasoning in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) and its Amended Opinion filed in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) impacts SMRWMD. Many non-Indian people and entities located in Charles Mix County negatively impacted by earlier decisions found themselves, in later decisions, to be free of the reservation status

conflicts. Now we learn that some fee lands may again be at risk of being within the confines of the reservation. This unresolved issue addressing non-Indian owned fee lands retaining reservation status is what concerns petitioner SMRWMD.

STATEMENT OF THE CASE

The district court determined that all land allotted to individual Indians in the 1890's 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)." *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007). The court of appeals affirmed the district court, except that it vacated the district court's holding that fee lands continuously held in Indian ownership were "reservation" since there was no evidence that such lands existed. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009). In addition, the court of appeals added a new classification of Indian country, not found by the district court or even argued by the parties. The court of appeals held that after the passage of § 1151(a), June 25, 1948, Indian allotments, Indian title to which has been extinguished, no longer left Indian country status, but retained "reservation status" under § 1151(a). The panel issued a subsequent Order stating that the language of the opinion concerning the post-1948 distinction was not in its holding and that it would

excise "footnote 10 and several textual asides" to reduce any potential misunderstandings. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). An Amended Opinion followed incorporating those changes. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). It is from this Amended Opinion and Judgment that this Petition is taken.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Eighth Circuit Squarely Conflicts With the Decision of the Unanimous South Dakota Supreme Court; With Decisions of This Court; With Decisions Within the Eighth Circuit; With Other Federal Circuit Court of Appeals Decisions; and With Established Indian Law Jurisprudence.

When the panel affirmed the district court in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009), on its own motion it added over 7,000 additional acres of noncontiguous, non-Indian, fee land to this already unprecedented reservation. It did so by making a distinction, for the first time in legal history, between allotted land to which the Indian title had been extinguished prior to and after June 25, 1948. The court wrote, "Congress reentered the debate in 1948 by adopting § 1151, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757, but the statute mainly codified earlier Supreme Court decisions regarding Indian country." *Yankton Sioux Tribe v.*

Podhradsky, 577 F.3d 951, at 964 (2009). The court continued, "However, the enactment of § 1151(a) added an important twist to the nature of reservation land. According to its terms, reservation land remains Indian country 'notwithstanding the issuance of any patent.'" *Id.*, 964. The court then concludes, "Thus, 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.*, 967. The reader is then directed to footnote number 10: "It is unclear from the record whether any allotments have been patented in fee since 1948 and subsequently sold to white owners. If such lands exist, however, they would continue to be Indian country under the clear terms of § 1151(a). The holding in *Gaffey II* that lands which passed into white ownership lost reservation status thus only applies to pre-1948 conveyances." *Id.*, 967.

SMRWMD has seen its facility develop in excess of expectations. The facility has grown and anticipates further growth. SMRWMD looks to the future to project what needs it will have in the coming century as an active area landfill; one area being site expansion. The reasoning presented in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) limits these expansion possibilities. By creating reservation boundaries around isolated, non-contiguous tracts of land to a total number of which has yet to be identified, SMRWMD must now be very selective in expanding. It cannot buy any land the allotted title to which was extinguished post-June 25,

1948. Such land may be within the limits of the Yankton Sioux Reservation and, thus, the landfill would arguably subject itself to the regulatory authority of the Tribe and federal government. The Tribe could possibly prohibit expansion of the landfill within the limits of the reservation. In an orderly expansion, SMRWMD would look for adjacent lands next to the existing "trench" sites. If such land is subject to this opinion, it is no longer an option for landfill expansion purposes. This may mean that SMRWMD would have to seek land far from the area of its original site.

Furthermore, using this unresolved post-1948 legal theory, the Tribe could effectively limit SMRWMD expansion options. By buying strategic parcels of land, even relatively small in size, and placing them into trust, the Tribe can create a reservation buffer around the rural landfill that it has been opposing for the last fifteen years. While the landfill has seen great growth and prosperity, it does not mean that it is an economic or profitable endeavor. SMRWMD stays ahead of its debts, so to speak, but it is always on a tight budget. For SMRWMD, the end result is not profit, but rather providing a service to area political entities. Expansion in a post-*Podhradsky* opinion era may mean greater costs to SMRWMD. This court of appeals reasoning could impede SMRWMD growth to an extent that it would not be able to meet its debts in the future if expansion costs are so great. In addition, many non-Indian landowners who have from generation to generation

farmed their fee-owned lands may now find themselves within the confines of a reservation.

A subsequent Order on Rehearing and an Amended Opinion removed the footnote regarding the 1948 fee lands and some of the language from the original panel opinion described above. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (2010). However, the practical consequences of the original Opinion, the subsequent Order and the Amended Opinion are clear. The court ruled on the issue of post-1948 lands, but never incorporated the issue in its judgment. So, while some of the post-1948 "musings" are not contained in the court's holding, the question remains ripe for additional litigation.

This Court should authoritatively resolve the post-1948 fee land issue for two reasons. First, as the State has pointed out, the Order deleting the post-1948 fee land footnote is just a short term fix. The rationale for including post-1948 fee lands with 18 U.S.C. § 1151(a) reservation boundaries has not been completely withdrawn from the Amended Opinion. As a result, the text of the original Opinion will undoubtedly be used in future litigation to argue that post-1948 fee lands are within the limits of an 18 U.S.C. § 1151(a) reservation. Secondly, post-1948 fee land "reservation status" expressly conflicts with the "allotments in fee" holding in *Gaffey*.

Another portion of the panel's opinion also suggests review is appropriate. The panel recognizes

reservation boundaries around all Indian allotments still held in trust. This holding also conflicts with the allotment-to-fee holding in *Gaffey*, and conflicts as well with the recent *Corps* case within the Circuit that expressly adopted this aspect of *Gaffey* as the holding in the *Corps* case. *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010). If the panel is correct that all allotments now held in trust are encompassed in 18 U.S.C. § 1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that allotments, now in fee, are not within 18 U.S.C. § 1151(a) reservation boundaries. In other words, 18 U.S.C. § 1151(a) boundaries do not automatically disappear just because a fee patent is issued; and 18 U.S.C. § 1151(a) reservation boundaries are not automatically created because dicta in an opinion is taken out of context by the court of appeals. Congress has a role in this reservation boundary process that the court of appeals has not respected. Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the Yankton Act (which disestablished the 1858 reservation boundaries). If any allotments were within an 18 U.S.C. § 1151(a) boundary at any time after the proclamation in the Yankton Act, *Gaffey* was wrongly decided. This conflict should be granted review.

Finally, United States Supreme Court decisions and other State and Federal decisions (and the supporting citations) undermine the opinion of the court of appeals. *DeCoteau v. District County Court*, 420

U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) are the two leading cases from the United States Supreme Court. The analysis of the United States Supreme Court tracks the earlier analysis of the Court in *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967). Decisions of the South Dakota Supreme Court also track the analysis of *Beardslee,* including, most recently, *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999).

For decades, the principles set forth in *Beardslee* reflect the way the law has been understood and applied in this area of Charles Mix County, South Dakota. Judge Blackmun, later Justice Blackmun, detailed the court's understanding of 18 U.S.C.A. § 1151:

> "Indian country", as that term is employed in § 1153, is defined in 18 U.S.C. § 1151. The definition of clause (a) of § 1151 would seem clearly to include the town of Mission, and the site of the alleged offenses, for it is "within the limits" of the Rosebud Reservation "notwithstanding the issuance of" the 1912 patent. The defense, however, pivots its jurisdictional argument on clause (c), which would include, within the definition of Indian country, 'all Indian allotments, the Indian titles to which have not been extinguished'. It is then urged that, by inference, an Indian title which has been extinguished is outside the definition.

We decide this issue against the defense. We do so in view of the following:

1. The Rosebud Reservation was established by, and is described in § 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, § 12.0162 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion of the reservation has ever been formally opened. Instead, that portion has remained closed since 1889. The general geographical situation is thus clear. *Id.* at 284-285.

. . . [W]e find no legislation by which Congress has taken away from the Rosebud Sioux any part of the land of Todd County, all of which is *within* the boundaries of the area which has been recognized as their reservation since 1889. (emphasis added). . . .

. . . [1] 3. Federal jurisdiction is not present, of course, even though an Indian may be the defendant, where the offense site was never reservation land or is on a disestablished portion of a reservation, however that disestablishment may have been effected. This is the obvious inferential holding of *Seymour*

> and is the direct holding in the following cases. . . . *Id.* at 286.
>
> . . . Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. § 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of § 1151. *We regard clause (c) as applying to allotted Indian lands in territory now open [disestablished] and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checker boarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear.* *Id.* at 287, (emphasis in last paragraph is mine).

The analysis in *Beardslee* and the supporting citations squarely undermine the decision of the court of appeals in every significant respect. This Court followed this understanding when it issued its opinion in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), and a history of cases, including *Bruguier,* decided by the South Dakota Supreme Court, repeatedly reflect this understanding.

II. RESULT ORIENTED DECISION MAKING LEADS TO ENDLESS LITIGATION.

In its Amended Opinion, the Eighth Circuit Court of Appeals writes:

> In short, the 11,000,000 acre domain once assigned to the Tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894. The issues now before us include the status of some 37,600 acres held in trust. Whatever the size of the remaining reservation lands, there is evidence in the record that they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.

Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994, 1002 (2010). These three short sentences offer insight why finality has been elusive in this case. The first two sentences appear very factual; the third emotive. The third sentence suggests that something must be done, some decision rendered, that gives the Yankton Sioux a reservation, if not based in sound legal reasoning, then because the reservation has a "continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage." An emotional link to this land by the Yankton Sioux Tribe, while maybe true, is in no way dispositive and should not bias the decision maker. Result oriented decisions driven at correcting a

perceived past injustice do not work. This is because they necessarily conflict with established legal principles. In addition, in this case they conflict with the settled expectations recognized by this Court in its decision *Yankton Sioux Tribe v. Southern Missouri Waste Management District,* 890 F. Supp. 878 (D.S.D. 1995). Applying fertilizer to an already rich soil sprouts a harvest of massive and unending litigation. In this case, it has led to years of litigation, created more questions and will lead to more litigation. See: *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878 (D.S.D. 1995); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1996); *South Dakota v. Yankton Sioux Tribe*, 1997 WL 762057 (Dec. 8, 1997); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135 (D.S.D. 1998) (*Gaffey I*); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (*Gaffey II*); *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*); *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009) (*Podhradsky II*); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010) (*Podhradsky III*); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) (*Podhradsky IV*); *Yankton Sioux Tribe v. United States Corps of Engineers*, 2008 WL 895830 (D.S.D. March 31, 2008); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010).

The decision appealed from has raised never before heard of legal theories concerning Indian jurisdiction, left many unanswered questions and, in addition, conflicts with this Court, other federal circuit courts including the Eighth Circuit itself, and the South Dakota Supreme Court. Left alone, all of the parties hereto, already taxed by fifteen plus years of litigation, will continue to suffer under unending uncertainty and ongoing litigation pitting community member against community member. In a recent attempt at mediation by the parties, the number one goal identified by all was *finality*; an end to the endless litigation! Because of flawed federal Indian policy for three centuries past and the relentless but shifting advocacy of the United States government the community members of Charles Mix County have been pitted against each other. The courts have seemingly tried to solve perceived past injustices with what appears to be result oriented decision making and it has not worked. The parties are asking this Court for that *finality*.

III. THIS CASE PRESENTS A QUESTION OF FEDERAL LAW THAT IS IMPORTANT AND NATIONAL IN SCOPE.

As cited above, in footnote 10 of its original Opinion, the court of appeals, in discussing the post-1948 allotments, stated that it was unclear from the record whether any allotments have been patented in fee since 1948. A subsequent search of the recorded deeds indicates that of the approximate 440,000 acres

comprising the original reservation there are over 7,000 acres of post-1948 allotments. Tripp and Gregory County, South Dakota, as amici, reported over 30,000 acres, in the former Rosebud Reservation area. Taken across the United States this unsettled issue will explode. While the court of appeals in its judgment did not directly hold for or against the issue, it did distinctly decide the issue. A multi-million dollar public school located on fee land in the city of Wagner, South Dakota, finds itself on a post-1948 allotment. Across the United States there most certainly will be many individuals and entities challenged with the realization that they too may be litigating the new "reservation status" issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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