Nos. 10-929/10-931/10-932

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

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

AMICUS CURIAE BRIEF OF CHARLES MIX ELECTRIC ASSOCIATION, INC. AND ROSEBUD ELECTRIC COOPERATIVE, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

MICHAEL J. WHALEN
MICHAEL J. WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae
Charles Mix Electric Association, Inc. and
Rosebud Electric Cooperative, Inc.

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OR CALL COLLECT (402) 342-2831

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Pursuant to Supreme Court Rule 37(2), Charles Mix Electric Association, Inc. of Lake Andes, South Dakota, and Rosebud Electric Cooperative, Inc. of Gregory, South Dakota, hereby respectfully submit this brief as *amici curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICI* COOPERATIVES[1]

Charles Mix Electric Association, Inc. ("Charles Mix Electric" herein) and Rosebud Electric Cooperative, Inc., ("Rosebud Electric" herein) are both nonprofit rural electric distribution cooperatives incorporated in 1945 under South Dakota Law. Charles Mix Electric serves rural Charles Mix County. Rosebud Electric serves rural Gregory and Tripp Counties. The original (1858) Yankton Sioux Indian Reservation was located in what is now Charles Mix County, South Dakota. The original (1889) Rosebud Indian Reservation included what is now Gregory, Tripp, Lyman, Mellette and Todd Counties, South Dakota. These diminished reservations share a common history,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only the identified *amici curiae* made monetary contributions and funded the preparation and submission of this brief.

especially with regards to treaty and statutory language, Indian allotments, ceded surplus lands, and subsequent white settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

By South Dakota statute, each of these cooperatives serves an assigned territory. S.D.C.L. § 49-34A-42. Charles Mix Electric's service territory includes approximately 36,500 acres of "Indian country" on the east side of the Missouri River. Rosebud Electric's service territory includes approximately 88,000 acres of "Indian country" on the west side of the Missouri River. The Indian lands served by these two cooperatives are scattered in "checkerboard" fashion throughout their respective service territories. In the past several years the Yankton Sioux Tribe and the Rosebud Sioux Tribe have each sought to exercise regulatory authority over businesses located within the former (1858 and 1889) reservation boundaries. These efforts included business licensure, taxation, rate regulation, imposition of a tribal utility code, and establishment of a tribal utility commission.[2]

The *amici* cooperatives are currently regulated by both state and federal law which prohibit rate

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[2] See Appendices A and B, Title 11 and 20 of the "Law and Order Code of the Rosebud Sioux Tribe". See also Appendix C, May 27, 2009 correspondence to Rosebud Electric Cooperative, Inc., from Rosebud Sioux Tribe Utility Commission Office.

discrimination within the same class of consumers. Under controlling law, the same rates must apply to tribal members and nonmembers regardless of location of service, i.e. fee, tribal, or trust lands. Cooperative law also requires that each class of consumers bears the operating costs and expenses required to furnish service to that class. *Lillethun v. Tri-County Elec. Cooperative, Inc.,* 152 N.W.2d 147 (N.D. 1967). Under the terms of United States Department of Agriculture guaranteed Rural Utility Service ("RUS") loans and federal regulations, distribution cooperatives are required to design and implement rates to provide sufficient revenue to:

(i) pay all fixed and variable expenses;

(ii) provide and maintain reasonable working capital; and

(iii) maintain, on an annual basis, minimum "coverage ratios" (TIER, DSC, OTIER, and ODSC) to ensure "reasonable security for and/or the repayment of loans made or guaranteed by RUS."[3]

See 7 C.F.R. § 1710.114. Failure to meet such requirements may result in default, acceleration of the debt, and operational "take-over" by RUS.[4]

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[3] RUS Standard Loan Contract, Article I, § 5.4.

[4] RUS Standard Loan Contract, Article VII, § 7.1 and Article VIII, § 8.1.

The decision of the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), would arguably subject the *amici* rural electric cooperatives to utility regulation (including rate making) by the resident tribes; at least to the extent of the scattered tribal and trust lands. This is so because the Court in *Podhradsky* expressly held that Indian allotments and trust lands within a diminished Indian reservation retain their reservation status and constitute "Indian country" under 18 U.S.C. § 1151(a), and therefore fall under "the primary civil, criminal, and *regulatory* jurisdiction of the federal government and the resident Tribe rather than the states." *Id.* at 1006 (emphasis added).

For these *amici* cooperatives (and those similarly situated), the consequences of tribal regulation would be disastrous because tribal rates, rules, and procedures differ from those governing the other 85% to 90% of the consumers within the same service territory. The cooperatives would invariably find themselves at odds with one authority or another for discriminatory or disparate treatment within the same class of consumers. Although Tribal Utility Codes may defer to federal regulations and RUS loan provisions, there is no assurance that rates established by the Tribal Utility Commissions would be sufficient to meet the minimum standards required by RUS loans and federal regulations. Thus, these non-profit cooperatives could face default and foreclosure.

This intolerable situation is not confined to the *amici* cooperatives. In the past few years, the national trend toward tribal regulation of utilities has grown dramatically. In South Dakota alone, four Tribes have established tribal utility codes, taxes, and commissions.[5] Other Tribes have sought to impose gross revenue, sales, and/or business taxes upon electric distribution cooperatives for the privilege of doing business in diminished reservations.[6] Of the 28 rural electric distribution cooperatives in South Dakota, 14 serve tribal and trust lands within their respective service territories.[7]

The practical effect of the Eighth Circuit Court's holding in the *Podhradsky* case is to create innumerable "mini-reservations" within electric service territories where tribal utility commissions may impose rates and rules without regard to 85% to 90% of the other consumers within the same area and classification. For Charles Mix Electric and Rosebud Electric the situation is unmanageable.

ARGUMENT

I. HISTORICAL SUMMARY

The "tangled history" of the Yankton Sioux Reservation has been set forth in numerous federal and

[5] Crow Creek Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, and Standing Rock Sioux Tribe.

[6] Sisseton-Wahpeton Sioux Tribe and Yankton Sioux Tribe.

[7] See Appendices D and E.

state decisions. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Perrin v. United* States, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691 (1914); *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1999); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *Yankton Sioux Tribe v. United States*, 623 F.2d 159 (Ct. Cl. 1980); *Bruguier v. Class*, 1999 S.D. 122, 599 N.W.2d 364; *State v. Greger*, 1997 S.D. 14, 559 N.W.2d 854; *State v. Thompson*, 355 N.W.2d 349 (S.D. 1984); *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977); *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95 (1964); *State ex rel. Hollow Horn Bear v. Jameson*, 77 S.D. 527, 95 N.W.2d 181 (1959).

A brief summary of that history is as follows: The Yankton Sioux Indian Reservation was created by the 1858 Yankton Treaty of Cession. The reservation originally consisted of 430,495 acres in what is now Charles Mix County, South Dakota. With the passage of the General Allotment (Dawes) Act of 1887, the Yankton Sioux Reservation was partitioned into parcels ("allotments") assigned to individual tribal members. In 1892, the Tribe and the United States negotiated a second treaty, which Congress ratified in 1894 (the "1894 Act"). By this agreement and for a

"sum certain" ($600,000), the Tribe "ceded, sold, relinquished, and conveyed" all of its unallotted or "surplus" land (168,000 acres) to the United States. President Cleveland opened the unallotted land for settlement in 1895 and the area filled with white settlers. Tribal government quickly faded and became nonexistent. By 1913, Yankton Sioux tribal members held 70,000 acres. By 1930, tribal members owned only 43,358 acres. Of the 262,000 acres originally allotted, only about 15% remained in Indian hands. At present, total Indian holdings in the region consist of approximately 30,000 acres of allotted land and 6,500 acres of tribal land. Most of these remaining Indian lands are held in trust by the United States government for the benefit of individual tribal members and the Tribe itself. The process of "diminishment" of the Yankton Sioux Reservation is fully documented in both *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333-40, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998) and *State v. Greger*, 559 N.W.2d 854, 856-59 (S.D. 1997).

II. CONFLICT WITH STATE SUPREME COURT

The holding of the Eighth Circuit Court in *Podhradsky* directly conflicts with the South Dakota Supreme Court's decisions regarding the former Yankton Sioux Reservation. The South Dakota Supreme Court held in *State v. Greger,* 559 N.W.2d 854 (S.D. 1997) that:

> For over one hundred years, federal and state authorities have treated the Yankton Sioux Reservation as diminished. By agreement of tribal members and an Act of Congress, all unalloted reservation lands were sold to the United States and opened for settlement in 1895. The United States Supreme Court in 1914 referred to the very area now in question as no longer part of the reservation, and, in four separate decisions, this Court concluded diminishment occurred. Statutory language, contemporary negotiations, land ownership, population patterns and "jurisdictional history" all support diminishment. After more than a century, no other expectation is reasonable – using the [United States] Supreme Court's "clean analytical structure," the evidence is clear: the Yankton reservation has been diminished.

Id. at 867.

A few years later and mindful of the United States Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the South Dakota Supreme Court handed down its decision in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). There, the State Supreme Court, using the traditional three factor analytical structure, held that the Yankton Sioux Reservation had been *disestablished* by the 1894 Act and that formerly allotted land did not qualify as "Indian

country" under 18 U.S.C. § 1151(a). *Id.* at 371-78. Further, in construing Section 1151 the State Supreme Court stated, " . . . Congress intended subsection (a) to apply to the closed area of reservations, and (c) to apply to allotted lands in open territory." *Id.* at 371; citing *State ex rel. Hollow Horn Bear*, 77 S.D. 527, 95 N.W.2d 181 (1959).

However, the Eighth Circuit Court in *Podhradsky* pointedly disregarded *Greger* and *Bruguier* and ruled that the Yankton Sioux Reservation "was never disestablished" and that allotments are part of the "continuing" Yankton Sioux Reservation and therefore qualify as "Indian country" under 18 U.S.C. § 1151(a). *Podhradsky*, 1010. Going further, the Court held that allotments still held in trust are land within the limits of an Indian reservation under the jurisdiction of the United States Government. *Id.*

Central to the Eighth Circuit Court's analysis was its determination that, "In the absence of any clear congressional intent to divest allotted lands on the Yankton Sioux Reservation of their reservation status, those [allotted] lands retained such status, and all outstanding allotments continue to be reservation under § 1151(a)." *Podhradsky*, 1017. Yet in *Bruguier,* the South Dakota Supreme Court concluded that the Congressional intent behind the language of the 1894 Act was "unmistakable" and that Congress intended to terminate the reservation. *Bruguier*, 377.

The obvious conflict between the South Dakota Supreme Court and the Eighth Circuit Court of Appeals

cannot be reconciled. In *Podhradsky* the federal appellate court dismissively commented that, "*Bruguier's* conclusion that the Yankton Sioux Reservation had been disestablished in 1894 was more sweeping than necessary for resolution of the matter at issue. . . ." *Podhradsky*, at 1005 n. 7. Such a perfunctory dismissal of Justice Konenkamp's careful scholarship in *Greger* and *Bruguier* tends to underscore the need to resolve the persistent conflict between South Dakota's highest court and the Eighth Circuit Court of Appeals.

III. *MONTANA v. U.S.*

The distinction between "1151(a) Indian country" and "1151(c) Indian country" is all important to the *amici* cooperatives because whether the lands in question are "within a reservation" is determinative of tribal civil and regulatory jurisdiction over non-Indian activities. *See Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997); and *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). It is settled law that tribes generally do not possess authority over non-Indians who come within their borders. *Montana*, 450 U.S. 544, 564-65 (1981); *Strate v. A-1 Contractors,* 520 U.S. 438, 446 (1997). This is so because nonmembers have no part in tribal government and have no say in the laws and regulations that govern tribal territory. *Plains Commerce*

Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 371, 128 S.Ct. 2709, 2724, 171 L.Ed.2d 457, 477 (2008). However, *Montana* provides two exceptions: (1) a tribe may regulate, through taxation, licensing, and other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Plains Commerce Bank*, 329-30, citing *Montana*, at 565.

Both *Montana* exceptions require that the activities of the nonmember occur on the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). ("The operative phrase is 'on their reservations'.") Neither *Montana* nor its progeny purports to allow Indian Tribes to exercise civil or regulatory jurisdiction over the activities or conduct of non-Indians occurring outside their reservations. *Id.* at 1091. Thus, for the *amici* cooperatives, the critical question is whether the trust allotments in the diminished Yankton Sioux Reservation are "within a reservation" under subsection (a) of 18 U.S.C. § 1151.

IV. "WITHIN A RESERVATION" vs. "RESERVATION STATUS"

The Court in *Podhradsky* departs from the plain meaning of 18 U.S.C. § 1151 in its determination that allotments retain their "reservation status" despite the removal of exterior reservation boundaries. It does so by straying from the literal and logical meaning of the words of the statute in favor of an attenuated theory of residual "reservation status".

18 U.S.C. § 1151 provides:

> [T]he 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.

18 U.S.C. § 1151 was originally enacted to define federal *criminal* jurisdiction. Only by judicial fiat has

it come to have implications for tribal taxation and civil/regulatory jurisdiction. *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 527, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998) citing *DeCoteau v. District County Court for Tenth Judicial District,* 420 U.S. 425, 427, n. 2 (1975). In analyzing 18 U.S.C. § 1151, the South Dakota Supreme Court in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, interpreted the statute to mean that subsection (a) encompassed those areas *within a reservation,* and that subsection (c) applies to those lands standing *outside the reservation boundaries. Bruguier*, 371. This common sense interpretation was made with due regard for and careful consideration of the United States Supreme Court's decision in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *See Bruguier v. Class*, 599 N.W.2d 364, 365 (S.D. 1999). For the South Dakota Supreme Court, the term "within the limits of any Indian reservation" meant exactly that – land within the delineated boundaries of a geographically identifiable reservation.

By contrast, the Eighth Circuit Court in *Podhradsky* couched much of its decision in terms of "reservation status". *Podhradsky*, 1008-10. In using "reservation status" rather than "within the limits of any reservation", the Eighth Circuit panel granted itself an interpretive license to disregard the fact that the boundaries of the former Yankton Sioux Reservation have unquestionably been "obliterated". *See, e.g., United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206,

63 S.Ct. 534, 87 L.Ed. 716 (1943). The Court of Appeals justified its departure from the plain meaning of 18 U.S.C. § 1151(a) by referencing *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), wherein the Court stated that, "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". *Solem*, at 470, citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909). The defect in the *Podhradsky* Court's "reservation status" analysis is that in *Solem* the Supreme Court was not dealing with a *diminished* reservation. As the Court expressly found in *Solem*, "The Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." *Solem,* 465 U.S. 463, 476. The Court in *Podhradsky* carelessly borrowed the term "reservation status" from a case factually distinguishable from the instant case.

Moreover, the Eighth Circuit Court engaged in considerable legal wrenching to fit the "square peg" of trust allotments in the "round hole" of section 1151(a). It began with the correct assertion that allotted trust lands were "Indian country" under § 1151(c). From there, however, the Court in *Podhradsky* set a strident course to scale the "almost insurmountable presumption of diminishment" arising from the statutory language and historical context of the 1892 Agreement and 1894 Act.

Instead of giving due weight to the overwhelming evidence of diminishment, the Eighth Circuit Court turned a blind eye to such evidence and pursued its philosophically preferred conclusion that a continuing reservation existed. In particular, the Court in *Podhradsky* found that:

(A) "The simple act of dividing the reservation was insufficient to divest the allotted lands of reservation status". *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1008 (8th Cir. 2010).

(B) "The Tribe's willingness to cede to the United States its unallotted land does not indicate that the reservation status of allotted lands was also revoked." *Id.*

(C) "We have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.*

(D) "Simply stated, there is nothing in the historical and documentary record to indicate a congressional intent to terminate the reservation status of the allotted lands immediately upon ratification of the 1894 Act or the opening of the ceded territory to white settlement." *Id.* at 1009.

(E) "In the absence of such an intention, we must conclude that at the time of the [1894] Act those [allotted] lands retained the same reservation status they had enjoyed since the original 1858 Treaty." *Id.*

However, those findings ignored one simple fact: the reservation boundaries were removed under the plain language of the 1892 Agreement and 1894 Act. As pointed out by Justice Konenkamp in *Bruguier v. Class,* 1999 S.D. 122, 599 N.W.2d 364, "[T]he boundaries created by the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate *any* boundary. . . ." *Id.* at 371 (emphasis added). The United States Supreme Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587-88, 65 L.Ed.2d 665 (1980). That geographical component has generally been ignored in *Podhradsky.*

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the United States Supreme Court determined that:

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unalloted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. See *DeCoteau, 420 U.S., at 445*. Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a

provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises. *Solem, supra, at 470*; see also *Hagen, supra, at 411.*

The terms of the 1894 Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau, supra, at 445*, and, as in *DeCoteau*, the 1894 Act ratified a negotiated agreement supported by a majority of the Tribe. Moreover, the Act we construe here more clearly indicates diminishment than did the surplus land Act at issue in *Hagen*, which we concluded diminished reservation lands even though it provided only that "all the unallotted lands within said reservation shall be restored to the public domain." See *510 U.S., at 412.*

The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. In both *Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962)*, and *Mattz v. Arnett, 412 U.S. 481, 501-502 (1973)*, we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus

> lands belonging to the Cheyenne River Sioux as language of cession. See *465 U.S., at 472.* In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

Id. at 344-45.

At most, the United States Supreme Court envisioned a severely diminished reservation; although it stopped short of deciding whether the reservation was fully "disestablished". ("We need not determine whether Congress disestablished the reservation altogether in order to resolve this case, and accordingly decline to do so." *Id.* at 358.) Nonetheless, such judicial restraint should not be mistaken for a license to create reservation boundaries where Congress specifically removed them a century ago.

Despite the Eighth Circuit Court's reliance on "reservation status" in *Podhradsky*, scant authority exists to support the theory that § 1151(a) applies where no reservation boundaries exist. Rather, the controlling case law consistently holds that Indian allotments outside reservation boundaries derive their "Indian country" status from their allotment character, not from residual "reservation status". *United States v. Stands*, 105 F.3d 1565, 1571-72 (8th Cir. 1997); *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914). For § 1151(a) to apply, there must be identifiable reservation boundaries. *See*

United States v. Celestine, 215 U.S. 278, 285-86, 30 S.Ct. 93, 54 L.Ed. 195 (1909); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Mattz v. Arnett*, 412 U.S. 481, 506, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). Thus, the Eighth Circuit Court's "reservation status" approach is inapposite here where the boundaries have been removed by treaty and statute.

The Court's theory of "reservation status" without reservation boundaries, then, is akin to asserting that a shadow remains after the object casting the shadow has been removed. Justice Konenkamp of the South Dakota Supreme Court offers a less ethereal jurisdictional theory for 18 U.S.C. § 1151:

> If subsection (a) is to receive a literal interpretation, a patent to allotted lands within the limits of such a reservation which operated to extinguish the Indian title could not remove such a tract from Indian country, but under subsection (c) such a patent would so operate. Hence, it seems logical to believe that the Congress intended subsection (a) to apply to the closed area of reservation, and (c) to apply to allotted lands in open territory. *Hollow Horn Bear,* 77 SD at 533, 95 NW2d at 185. If the only Indian country remaining is land the Yankton Tribe acquired long after the 1894 Act, along with remaining Indian owned allotments under § 1151(c), then the

> Yankton Sioux Reservation may be considered congressionally terminated.

Bruguier v. Class, 599 N.W.2d 364, 371 (S.D. 1999).

Essentially, Justice Konenkamp finds there is no § 1151(a) "Indian country" within the former Yankton Sioux Reservation. His approach does no harm to federal and tribal criminal jurisdiction on allotted trust lands and agency property because such lands and property still qualify as "Indian country" under subsections 1151(b) and (c). Yet, the fee owners of former allotments and businesses providing goods and services to current trust lands are not subject to the civil or regulatory authority of the Yankton Sioux Tribe because such lands are not "within a reservation" as required by *Montana*.

In summary, the Eighth Circuit Court in *Podhradsky* contrived a jurisdictional theory which put reservation boundaries around each parcel of allotted trust land in order to render it more "durable" § 1151(a) "Indian country". *Podhradsky*, 1008. However, this theory problematically assigns "reservation status" to allotted lands which have not been "within the limits of any reservation" for more than 100 years. Absent any actual reservation boundaries, the Eighth Circuit Court in *Podhradsky* effectively created "mini-reservations" out of the hundreds of parcels of allotted lands scattered throughout Charles Mix County. By doing so, the Court usurped the sole and exclusive power of Congress to create Indian reservations. *Sioux Tribe of Indians v. United*

States, 316 U.S. 317, 326, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942).

IV. THE AGENCY LAND

As discussed above, the Eighth Circuit Court in *Podhradsky* disregarded much of the United States Supreme Court's structural analysis in *South Dakota v. Yankton Sioux Tribe* in order to rule that the allotted lands retained their "reservation status". Moreover, the Eighth Circuit Court "cherry-picked" those few discrepant sentences within *South Dakota v. Yankton Sioux Tribe* which it felt supported its novel theory of a continuing reservation without boundaries. Specifically, the Eighth Circuit Court spotlighted the Supreme Court's statement that Article VIII of the 1894 Act reserved from sale those surplus lands "as may now be occupied by the United States for agency, schools, and other purposes" and quoted *Solem v. Bartlett,* 465 U.S. 463, 474, stating that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Podhradsky*, 1005.

However, in *Bruguier v. Class,* Justice Konenkamp specifically addressed the "agency, school, and other purposes" language of Article VIII of the 1894 Act. First, he noted that the land was originally reserved to the United States Government, not the Tribe. *Bruguier*, 599 N.W.2d 373 n. 15 (S.D. 1999). (The Tribe did not acquire the school and agency land until

February 13, 1929, when the Government returned it to the Tribe by Public Law No. 70-729, 45 Stat 1167.) Second, Justice Konenkamp explained:

> In keeping with the Dawes Act's twenty-five year trust period following the allotment process, setting aside government land for school and agency purposes was common, even for a terminated reservation. n. 16. In the 1891 treaty with the Sisseton-Wahpeton Tribes, it was understood that on the Lake Traverse Reservation, the United States would continue to own land for school and agency purposes. *See DeCoteau,* 420 U.S. at 435 n. 16, 95 S.Ct. at 1088 n. 16 ("Government should own the lands upon which the agency and school buildings are located."); *id.* at 438 n. 19, 95 S.Ct. at 1089 n. 19 ("'Indian title'" to lands occupied by the "'agency and missionary society'" will be "'extinguished'" (citation omitted)). Moreover, reserving such "lands for Indian schools, religious missions, and service agencies" did not preclude finding congressional intent to disestablish a part of the Rosebud Reservation. *See Rosebud Sioux Tribe v Kneip*, 430 US 584, 622, 97 S.Ct. 1361, 1381, 51 L.Ed.2d 660 (1977) (Marshall, J., dissenting).

Bruguier v. Class, 599 N.W.2d 364, 374 (S.D. 1999).

Thus, the "agency, school, and other purposes" language of the 1894 Act is not dispositive of whether Congress intended a continuing reservation. Moreover, such equivocal language does not countermand

the historical context, statutory and treaty language, expressed congressional intent, jurisdictional history, subsequent treatment, or contemporary demographics of the area; all of which point to a disestablished reservation.

VI. *BEARDSLEE v. U.S.*

The Eighth Circuit Court has previously interpreted 18 U.S.C. § 1151 subsection (a) and (c) to arrive at a construction of the statute markedly different than the Court's decision in *Podhradsky*. In *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), the defendant, an enrolled member of the Rosebud Sioux Tribe, killed his mother and half-brother on formerly allotted land situated in the town of Mission, South Dakota. Mission is located within the boundaries of the diminished Rosebud Indian Reservation and was therefore considered 1151(a) "Indian country" by the United States. The murder occurred at a house rented by the defendant's mother, but owned in fee by non-Indians. At trial, the defendant challenged jurisdiction on the basis that the site of the crime was formerly allotted land and had lost its "Indian country" status by reason of a 1912 patent to non-Indians. In *Beardslee*, the Eighth Circuit Court squarely addressed the substantive differences between "Indian country" under 18 U.S.C. §§ 1151(a) and 1151(c):

> 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 regard clause (c) as applying to allotted Indian lands in territory now open 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 checkerboarding 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. See *State ex rel. Hollow Horn Bear v. Jameson, supra,* pp.184-185 of 95 N.W.2d.

Beardslee v. United States, 387 F.2d 280, 285-87 (8th Cir. 1967).

Clearly, the *Beardslee* Court understood that § 1151(a)'s phrase "within the limits of any reservation" meant lands located within the geographically identifiable parameters of a reservation, whether fee or allotted land. Likewise, the Court in *Beardslee* recognized that allotted lands outside reservation boundaries fell within the purview of § 1151(c). Thus, the reference in *Beardslee* to allotted lands outside the bounds of a reservation as "*non-reservation land*"

is particularly instructive. If allotted trust land is not within reservation boundaries, it is § 1151(c) "Indian country" and not § 1151(a) "Indian country". Plainly, the *Podhradsky* Court's efforts to contort § 1151(c) allotments into § 1151(a) reservation land contravenes the plain meaning of the statute as well as existing case law.

CONCLUSION

The *amici* rural electric cooperatives are rightfully concerned that the Eighth Circuit Court's decision in *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 994 (8th Cir. 2010), has brought them to the brink of a regulatory disaster. Discriminatory utility regulation by differing Tribal Utility Commissions, each with the power to set rates and impose taxes, threatens the ability of these electric distribution cooperatives to provide service and power to its customers, including tribal members and entities. "Checkerboard" utility regulation within diminished Indian reservations not only violates basic principles of cooperative law, but also engenders never-ending litigation in tribal, state, and federal courts. This unmanageable situation is the result of the *Podhradsky* Court's misapprehension of established jurisdictional case law and disregard of the plain meaning of 18 U.S.C § 1151. Moreover, the decision in *Podhradsky* has the practical effect of putting reservation boundaries around innumerable allotments which have not been "within a reservation" for more than 100 years. Compelling reasons

exist for the Supreme Court to grant the Petitions for Writ of Certiorari, to-wit: the holding in *Podhradsky* conflicts with numerous decisions of the State Supreme Court and prior decisions of the Eighth Circuit Court of Appeals and the United States Supreme Court.

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MICHAEL J. WHALEN
MICHAEL J. WHALEN LAW OFFICE, PROF. LLC
110 Kansas City Street
Rapid City, South Dakota 57701
Telephone: (605) 341-5352
Email: mwhalen@rapidnet.com
Attorney for Amici Curiae Charles Mix Electric Association, Inc. and Rosebud Electric Cooperative, Inc.