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

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37(4), the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae,* in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Five of the *amici* Cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown, are located within the 1858 boundaries of the Yankton reservation. *Every one of these amici Cities is situated, in whole or in part, on the former allotments now held in fee, that are squarely at issue here.*[2] Two of the *amici* Cities, Geddes and Platte, lie close to the 1858 boundaries. Each of the *amici* Cities has operated, since its founding a few

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[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.

[2] Even before the post-1948 fee lands (former allotments) were implicated, by the panel *sua sponte*, the United States told this Court that all *amici* Cities, in whole or in part, should be within the Yankton Reservation. "The court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683).

years after the 1894 Yankton Act, as if no reservation boundaries exist.

The vital concern that prompts the filing of this *amici curiae* brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, a large portion of the area of Charles Mix County, South Dakota, including, in whole or in part, the *amici* Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue (230,000 acres of fee lands). Consequently, a significant percentage of the approximately 6,000 people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation.

Here, ninety percent (90%) of the land is owned by non-members and over two-thirds (2/3) of the residents are non-members who reside on small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia, and Wagner. In all, there are forty-nine (49) political subdivisions within the County.

The expectations of the people in this area should not be lightly regarded or simply set aside. *Hagen v. Utah,* 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 356-357 (1998).

In fact, the first time this Court heard oral argument in this case, the Court expressly contrasted responses that minimized the significance of this case, with a picture of confusion submitted by the brief of *amici* Cities. Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 835.[3]

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[3] That was the first time this issue was presented to this Court. Since then, although the participation of *amici* Cities in this litigation has sometimes been limited in the lower courts because of expense, *amici* Cities have always submitted arguments in this Court in support of Petitioners. *See generally* Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Petition for Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioner, State of South Dakota, on Writ of Certiorari, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581); Brief of the Cities Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v. Gaffey* (No. 98-4042); Supplemental Reply Brief of Dante, Wagner, Pickstown, Ravinia, Lake Andes, Geddes, and Platte, SD, as *Amici Curiae, Yankton Sioux Tribe v. Gaffey* (No. 98-4042); Brief for Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae* in Support of Appellants, *Yankton Sioux Tribe v. Gaffey* (Nos. 98-3893/3894/3896/3900SDSF); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Petitioners State of South Dakota, Charles Mix County and Southern Missouri Waste Management District, *South Dakota v. Yankton Sioux Tribe* (No. 99-1490); Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae,* in Support of Brief in Opposition of State and Local Government Parties, *Yankton Sioux Tribe v. Gaffey* (No. 99-1683); Brief *Amicus Curiae* of Cities Dante,

(Continued on following page)

Unfortunately, because the crux of this Court's Opinion has been ignored in the remands, twelve years of additional litigation have compounded the confusion. The United States has consistently ignored this prudential consideration. For these reasons, the issue is still of grave importance to the residents, the *amici* Cities and the other units of local governments in Charles Mix County, South Dakota.

To the extent a picture is worth a thousand words, the confusion is best reflected by the maps originally submitted in an appendix by the State of South Dakota in conjunction with the Petition for Rehearing and Petition for Rehearing *En Banc* in the court of appeals. State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos. 08-1441 and 08-1488) (Map A-Map F).

The State referenced the maps in the following sequence. 1. Historically, the area was simply recognized as a former reservation in the same manner as other areas formerly parts of Indian reservations. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Map B (1994 Former Reservation Area), *amici* Cities App. 2.

Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner in Support of County and State Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, *Yankton Sioux Tribe v. Podhradsky* (Nos. 08-1441 and 08-1488).

2. In 1995, the district court determined that the 1858 Yankton Reservation remained entirely intact. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1995). Map C (1995 District Court Decision Map), *amici* Cities App. 3.

3. In the first remand, the district court created an entirely new reservation of all the lands which had ever been in allotted status, including over 220,000 acres which had lost allotted status and which were owned by non-Indians. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (D.S.D. 1998). Map D (1998 District Court Decision Map), *amici* Cities App. 4.

4. In the next remand, the district court in *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007), found that all present day allotted land and trust land constituted "reservation" under 18 U.S.C. § 1151(a). Map E (2007 District Court Decision Map), *amici* Cities App. 5.

5. On appeal, the panel also declared, *sua sponte*, that former allotted land held in fee by nontribal members also remained "reservation" if it had lost allotted status after the effective date of 18 U.S.C. § 1151 – June 25, 1948. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951, 967 (8th Cir. 2009). Map F (2009 Panel Decision Map), *amici* Cities App. 6.

6. As a result, some 8,000 additional acres of fee lands were declared "reservation" despite the fact that at least 7,250 acres of this land are owned by individual non-Indians and local governments. Map A

(Post-1948 Allotment to Fee Patent Map), *amici* Cities App. 1.

Moreover, compounding this confusion is the fact that this sequence of maps does not include other maps that represent additional boundary arguments submitted by the United States and/or the Tribe, but rejected in the remand process, that could also be superimposed on top of this confusion.

If that was not enough, one could also consider the additional Indian country alternative the federal district court proposed, *sua sponte,* that ultimately did not have to be decided, such as the incredible "dependent Indian community" alternative, a "community" scattered over tens of thousands of acres of noncontiguous tracts of trust land and hundreds of miles.

> To the extent any of the trust land discussed in this opinion would be found by an appellate court to not be "reservation" land, and thus not Indian country under *§ 1151(a),* the Court finds such trust land would nevertheless qualify as Indian country under *§ 1151(b),* as a dependent Indian community. . . . If any of the trust land is found by a superior court to not be "reservation" land, and thus not Indian country under *18 U.S.C. § 1151(a),* such trust land qualifies as Indian country under *18 U.S.C. § 1151(b),* as a dependent Indian community.

Yankton Sioux Tribe v. Podhradsky, 529 F.Supp.2d at 1057.

It is profoundly disturbing that reservation status is even a possibility after this Court unequivocally rejected the argument of the United States and the Yankton Sioux Tribe that would have resurrected the 1858 reservation boundaries in *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998).

The Petition for Writ of Certiorari of Charles Mix County summarizes the role that the relentless advocacy of the United States has played in this process in this case, and in other similar cases. Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503. This advocacy is especially noteworthy in light of the fact that on remand, the United States was granted leave to intervene as a plaintiff in this litigation. The arguments the United States submitted thereafter caused additional conflict and confusion. The relentless advocacy of the United States provides a perspective from which any submission by the United States in this case should be viewed.

In fact, in its own words, the United States openly acknowledges a "strong interest in protecting the integrity of reservation boundaries." Brief for the United States Supporting Respondents at 1, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581). *Amici* Cities would submit that this Court, in deciding this case, should contrast that "strong interest" advocacy with the obligation of the United States to respect and uphold statutes enacted by the Congress of the

United States and the obligation of the United States to respect and uphold the decisions of this Court that have definitively construed those statutes. In this case, the United States has paid little attention to the role of Congress and this Court in our constitutional system. And the United States pays no attention to the fact that it is obligated to represent all citizens, whether Indians or non-Indians.

All of the above documents *amici* Cities' interest and continuing concern with this litigation, and further supports the Petition for Writ of Certiorari filed by the State of South Dakota, the Petition for Writ of Certiorari filed by Charles Mix County and the Petition for Writ of Certiorari filed by Southern Missouri Recycling and Waste Management District.[4]

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[4] Consideration of the Petitions in this case could be further influenced by an intracircuit conflict involving another case recently decided by a different panel in the Eighth Circuit. The State of South Dakota observed "the Tribe may seek certiorari in *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), likely arguing that it is in conflict with *Podhradsky IV* on this issue." Petition for Writ of Certiorari of the State of South Dakota at 35. The County also pointed out this intracircuit conflict. "This decision of the court of appeals conflicts with allotment/fee holding in *Gaffey*, App. I, 1999, and conflicts as well with *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010), that expressly adopted this aspect of *Gaffey* as the holding in that case." Petition for Writ of Certiorari of Charles Mix County at 20-21. On December 17, 2010, an application was granted by Justice Alito extending the time to file a petition in *Yankton Sioux Tribe v. United States Army Corps of Engineers* (No. 10A612) to February 20, 2011.

ARGUMENT

I. The decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), reflects the status of this area as understood by the people that live in *amici* Cities.

James Bruguier was convicted of burglary in state circuit court. He later also pleaded guilty to being an habitual offender. Bruguier committed his crime within the 1858 boundaries of the Yankton Reservation. The crime was burglary to a residence in the unincorporated City of Pickstown, South Dakota, on formerly allotted land where Indian title had been extinguished. In a habeas corpus action, Bruguier claimed that the 1858 Yankton Reservation boundaries remained intact and, as a result, the State lacked jurisdiction. The Circuit Judge, the Honorable Kathleen Caldwell, concluded in a Memorandum Opinion and extensive Findings of Fact and Conclusions of Law that the Yankton Reservation had been disestablished. The habeas corpus petition was denied. County App. I, 396, 407.

The Supreme Court of South Dakota, following the lead of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), as well as its own South Dakota cases, unanimously affirmed the circuit court. In the process, the Supreme Court of South Dakota concluded, as did the circuit court, that the 1894 Act "disestablished" and "terminated" the

Yankton Reservation. *Bruguier*, County App. I, 164. *Bruguier* is in direct conflict with the decision of the court of appeals in this case, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010).

Amici Cities anticipate the United States will find a way to argue against certiorari in this case, as the United States routinely does in every case where reservation boundaries have been resurrected (as in this case in 1998), or where reservation boundaries have been fashioned out of whole cloth (as in this case at the present time). Petition for Writ of Certiorari of Charles Mix County at 35-40. *See also* Brief of Charles Mix County, South Dakota in Support of Petitioner, *South Dakota Yankton Sioux Tribe* (No. 96-1581), County App. II, 460-503.

The last time the United States submitted a brief in this Court in this case (a brief in opposition), that brief keyed on the fact that the *Yankton Sioux Tribe* case in the Eighth Circuit was then in an "interlocutory stage." Brief for the United States in Opposition at 8, *Yankton Sioux Tribe v. Gaffey* (Nos. 99-1490 and 99-1683). According to the United States, certiorari should have been denied at that time because the Court would have a "further opportunity" to review the *Yankton Sioux Tribe* decision, together with any subsequent decisions of the court of appeals, after the proceedings on the remand were completed. *See also* the "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) and the "not ripe for this Court's review" argument (*Id.* at 21) and the "not a suitable vehicle" argument (*Id.* at 21). At the time,

the United States summarily dismissed the significance of the scope of *Bruguier*.

Now that the United States can no longer make a credible "interlocutory argument" (*Id.* at 8, 27) or a "time enough . . . to grant review at a later date" argument (*Id.* at 9, 27) or a "not ripe for this Court's review" argument (*Id.* at 21) or a "not a suitable vehicle" argument (*Id.* at 21), the *amici* Cities expect the United States to ignore most of the things that the United States told the Court in that brief in opposition regarding the "time enough for this Court to grant review at a later date" argument. We also expect the United States to denigrate the holding of *Bruguier* in a more sweeping fashion. In fact, we fully expect that the main thrust of the United States will be focused on undermining *Bruguier* in order to *obscure* the direct conflict that exists between the court of appeals in this case and the *Bruguier* decision of the Supreme Court of South Dakota.

For that reason, the *amici* Cities will review in detail the scope of the *Bruguier* litigation in the circuit court and the Supreme Court of South Dakota to remove any doubt regarding the extent of the direct conflict between the court of appeals and *Bruguier*.

A. The Memorandum Opinion and Order of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, June 30, 1998, County App. I, 396-406, confirm reservation disestablishment.

The United States would be clearly wrong in claiming that *Bruguier* did not squarely hold that the Yankton Reservation has been disestablished. When *Bruguier* was presented in the circuit court, the circuit court framed the issue in that comprehensive manner:

> In order to determine whether this crime occurred on Indian country as defined in 18 USC § 1151, the Court must make *two* separate inquiries. First, the Court must determine whether land within the 1858 reservation area retains reservation status under 18 USC § 1151(a). If the Court finds this land is a reservation under 18 USC § 1151(a), there was no jurisdiction to try Bruguier in the South Dakota Courts. If, however, the Court finds this land was not a reservation under 18 USC § 1151(a), it must then determine whether the allotments in this case are Indian country under 18 USC § 1151(c).

Bruguier v. Class, County App. I, 398 (emphasis added).

The *amici* Cities think that a careful consideration of the manner in which the circuit court decided *Bruguier* will clearly undermine the "no conflict" position. We expect the United States to agree. For that reason, the *amici* Cities emphasize the way in which the circuit court carefully structured the *Bruguier* decision.

With respect to the first issue, the circuit court specifically noted that:

> The Court's first inquiry is whether this land is within the limits of an Indian reservation under 18 USC § 1151(a). The State argues in *this* case that the Yankton Sioux Reservation was *disestablished* based upon both *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) and *Yankton Sioux Tribe*. . . . In *Yankton Sioux Tribe*, the Supreme Court declined to answer whether the reservation was disestablished because it concluded it was not a *necessary* determination in resolving that case.

Id. at County App. I, 399 (emphasis added).

The analysis of the circuit court begins with a quotation from this Court in *Yankton Sioux Tribe* that recognized the presumption of disestablishment because of the operative language in the Yankton Act. *Id.* at County App. I, 400 (emphasis added).

> This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. . . a "nearly conclusive," or "almost

> insurmountable," *presumption* of diminishment arises.
>
> The terms of the 1894 Act *parallel* the language that this court found *terminated* the Lake Traverse Indian Reservation in *DeCoteau*. . . .

Id. at County App. I, 400 (emphasis added).

The circuit court also rejected the argument that the saving clause precluded disestablishment. Rather, the circuit court noted that in *Yankton Sioux Tribe* this Court concluded that the clause only pertained to the continuance of annuities and not the 1858 reservation border. Accordingly, the circuit court found that the clause was not determinative on the issue of whether the reservation was disestablished. County App. I, 396-406.

The *Yankton Sioux Tribe* decision convinced the circuit court that the 1894 Act terminated the reservation. The circuit court stated that after considering the *Yankton Sioux Tribe* decision the 1894 Act:

> [E]xhibits a clear congressional intent to *terminate* the reservation. The "cession" and "sum certain" language in the Act clearly supports *termination* of the reservation under *DeCoteau*. Also, the *Yankton Sioux Tribe* Court specifically found the language in the Lake Traverse agreement involved in *DeCoteau paralleled* the language in the Yankton Sioux Agreement. 118 S.Ct. at 798.

Id. at County App. I, 402 (emphasis added).

In addition to the *Yankton Sioux Tribe* decision and the operative language in the 1894 Act, the circuit court found further support in the historical context surrounding the passage of the 1894 Act. This documentation included a Presidential Proclamation evidencing "perceived disestablishment" as well as references to the Commissioners' report of negotiations, all of which pointed to the "disestablishment of the Yankton Reservation." *Also see* the circuit court's references to the fact that the common understanding of the parties indicated the 1894 Act "terminated the reservation." County App. I, 405.

1. With specific reference to 18 U.S.C. § 1151(a), the circuit court concluded that the disestablishment found to exist was consistent with the practical realities of how land within the 1858 borders had been treated up until 1995. Citing this Court's decision in *Yankton Sioux Tribe*, as well as another South Dakota Supreme Court decision, the circuit court found that:

> it is clear from Congressional intent, the Presidential Proclamation, the Commissioners' report, the Tribal Constitution, and the later treatment of the lands within the 1858 reservation boundaries that *the reservation was terminated* by the 1894 Act. The allotted lands are *no longer a reservation* under 18 USC § 1151(a).

Id. at County App. I, 405 (emphasis added).

2. The circuit court addressed 18 U.S.C. § 1151(c) and also cited additional state cases dealing with areas, like the original Yankton area, where the original reservation boundaries were deemed to be extinguished. *See Hollow Horn Bear v. Jameson*, 95 N.W.2d 181 (S.D. 1959). The circuit court found that "an allotment to which Indian title has been extinguished . . . at the time the crime was committed . . . was no longer Indian country under 18 USC § 1151(c)." *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), cited in the County Petition and discussed at length in the Petition of Southern Missouri at 11, is also detailed and instructive on this point.

B. The Findings of Fact and Conclusions of Law of the Circuit Court for the First Judicial Circuit of the State of South Dakota, County of Charles Mix, *Bruguier v. Class*, August 14, 1998, County App. I, 407-430, confirm reservation disestablishment.

Subsequent to the circuit court's memorandum decision, the Petitioner in *Bruguier* moved for reconsideration and permission to supplement the record. Over the objection of the State, the circuit court allowed both parties to supplement the record and the circuit court reconsidered the case. As a result, the Findings of Fact and Conclusions of Law in the circuit court are explicit. They reference:

> relevant decision of the courts, the record in *State v. Greger*, 1997 S.D. 14, 559 N.W.2d

> 854 (which incorporates the record in the case which reached the United States Supreme Court [*Yankton Sioux Tribe*]), the affidavits, the supplemental materials referred to above, and the stipulation of the parties. The parties have stipulated, inter alia, that the burglary occurred on allotted land, the Indian title to which has been extinguished.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 409-410. As noted above, in the findings, the parties stipulated that the burglary occurred on allotted land, "the Indian title to which has been extinguished" (fee land). Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #9, County App. I, 410.

The circuit court set forth twenty-two pages of Findings of Fact and Conclusions of Law. As a result, the basis for the *Bruguier* opinion in the South Dakota Supreme Court was solid. It was not simply based on "reasoning" set forth in the opinion, as we expect the United States will claim. For example, Finding #17 stated:

> Prior to 1998, the Tribe has never alleged that a reservation existed which constituted all of the lands which were allotted to individual members in 1894, regardless of whether those allotments had been transferred into non-Indian hands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 411. In addition, the circuit court referenced its own files in Finding #22.

> This Court also takes judicial notice of its own files and finds that this Court, which is vested with civil and criminal jurisdiction over the affected area, has not distinguished between allotted lands in non-Indian ownership and ceded lands in non-Indian ownership. All of these nontrust lands have been treated as *nonreservation* and non-"Indian country" lands within state jurisdiction as a *historical matter* up to the time of the *Yankton Sioux Tribe* case.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, County App. I, 413 (emphasis added).

Other findings confirm that same understanding with a variety of files. Finding #22A, for example, confirmed that the *only* Indian country remaining in the area, in the understanding of both the Indians and non-Indians, was allotments, the title to which had *not* been extinguished. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #22A, County App. I, 413-414.

In other instances, the circuit court relied upon affidavits and related materials. Even the records of the United States confirmed the conclusion of the circuit court. *See* Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added), where the Acting Solicitor declared that the office had "assumed criminal jurisdiction *only* to the extent provided . . . on *unpatented* . . . " trust tracts. As the circuit court points out, the

balance of the finding confirms that the United States previously acknowledged disestablishment:

> *no reservation existed in the area* under 18 USC § 1151(a) and that the *only* "Indian country" remaining was trust allotments, the Indian title to which had not been extinguished, pursuant to 18 USC § 1151(c).

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #23G, County App. I, 417 (emphasis added). Other documentation further confirmed the position reflected in the circuit court's files.

Most recently, maps circulated by representatives of the United States following the decision of this Court in *Yankton Sioux Tribe*, together with maps submitted by the state's attorney and the city attorneys, indicated to the circuit court the "absurd" jurisdictional result which would occur if the theory of the habeas Petitioner in *Bruguier* was adopted. Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Finding #30, County App. I, 419-420.

The conclusions of law are explicitly tied to these findings of fact (a total of thirty-six). In conclusion, the circuit court stated:

> The Court concludes that *no lands within the area of the 1858 reservation retain "reservation" status pursuant to 18 USC § 1151(a).* The original Indian allotments which retain allotted status (in other words, those Indian allotments, the Indian titles to which have not been extinguished), retain "Indian country"

> status pursuant to 18 USC § 1151(c); the incident, however, is *not* alleged to have occurred on such lands.

Findings of Fact and Conclusions of Law, *Bruguier v. Class*, Conclusion #24, County App. I, 429-430 (emphasis added).

C. *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, confirms reservation disestablishment.

The South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999), County App. I, 164-198, was fortunate to have the extensive record and comprehensive Memorandum Opinion and Findings of Fact and Conclusions of Law of the circuit court.

The South Dakota Supreme Court first noted the holding of the circuit court that "the reservation had been 'disestablished' and that no lands within the former 1858 boundaries now constitute a reservation under 18 USC § 1151." *Id.* at County App. I, 166. And then the South Dakota Supreme Court expressly contrasted that holding with the position of the federal district court:

> On the same day the circuit court signed the findings, *the U.S. District Court ruled that the 1858 boundaries remain intact* . . . 14 F.Supp.2d 1135 (D.S.D. 1998).

Id. (emphasis added).

In this remarkable ruling of the federal district court, which the United States later neglected to bring to the attention of this Court, even after the federal district court was reversed in *Gaffey*, which the United States also neglected to bring to the attention of this Court, the federal district court simply ignored this aspect of the decision of this Court in *Yankton Sioux Tribe* and the express language set forth in the text of the Opinion. This Court made clear that the 1858 reservation boundaries of the Yankton Reservation were not maintained. "The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries. . . . The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were maintained. . . . [W]e conclude that the saving clause pertains to the continuance of annuities not the 1858 borders." *Yankton Sioux Tribe*, 522 U.S. 329, County App. I, 344-345, 347 (emphasis added).

With the benefit of the decision in *Yankton Sioux Tribe*, the South Dakota Supreme Court clearly understood the issue.

> More precisely, the question is whether parcels originally allotted to individual Yanktons compose part of a permanent reservation under 18 USC § 1151(a), or whether only those allotments still held in Indian hands are Indian country under 18 USC § 1151(c). . . . In *Yankton Sioux Tribe* . . .

> [t]he Court limited its holding . . . Left undecided was whether there now exists any reservation boundary, and if so, where it lies. We conclude, the boundaries created in the 1858 Treaty no longer exist because no provision was made in the 1894 Act to delineate any boundary . . . the Supreme Court . . . found that the 1894 Act is 'readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries.'

Id. at County App. I, 177-180.

The Supreme Court of South Dakota also referenced the briefs in the Joint Appendix from "*Yankton Sioux Tribe, et al. v. Gaffey, et al.* (8th Cir. 1999)," in addition to the record in *Yankton Sioux Tribe. Id.* at County App. I, 166. Then, the South Dakota Supreme Court also recognized the importance of the General Allotment Act. County App. I, 167, 182.

The Supreme Court of South Dakota respected the general principles set forth in *Yankton Sioux Tribe*. The Court stressed the importance of *DeCoteau* in *Yankton Sioux Tribe. Id.* at County App. I, 181, 195-196. The presumption of disestablishment was attributed to the language of the Yankton Act as set forth in detail at County App. I, 181. The Court found:

> Noteworthy in the 1894 Act is the absence of any provision for tribal ownership. No land was reserved even for tribal purposes. It was decades after the reservation was opened

> that the Tribe acquired land from the Government that the United States no longer needed. Act of February 13, 1929, Pub. L. No. 70-729, 45 Stat. 1167 (returning to Tribe 1000 acres titled in United States that had been [ceded to the United States but] reserved in the 1894 Act. . . .

Id. at County App. I, 185.

The fact that no land was reserved even for tribal purposes was contested by the United States and the Tribe in oral argument in *Yankton Sioux Tribe* (unresolved at that time and "crucial" according to at least one member of the Court). Transcript of Oral Argument, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581), County App. II, 845.[5] (In the remand, the fact that no land was reserved even for tribal purposes was not challenged by the United States or the Tribe, as documented in the opinion of the federal courts.)

Importantly, the Court recognized that after the cession "tribal title" did not involve allotments, as Felix Cohen explained in the initial Federal Indian Law text. *Id.* at County App. I, 183. As Charles Mix County has pointed out, the United States and tribal

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[5] In one exchange, Justice Scalia tried to get to the crux of the issue. County App. II, 844-845. But the Yankton Sioux Tribe and the United States did not come forth with the correct answer to the question (no lands in common, as Justice Scalia suspected). As a result, *Yankton Sioux Tribe* did not definitively resolve the status of the Yankton Reservation.

advocates ordinarily cite later tribal advocacy editions of this Cohen text, but at this stage in the *Yankton Sioux Tribe* proceedings, such references are "remarkably absent." Petition for Writ of Certiorari of Charles Mix County at 32. Moreover, the *amici* Cities agree with the County that Federal Indian Law texts undermine the position of the United States and the Yankton Sioux Tribe in this case, as well as the opinions on the remands.

Under the subheadings of "Historical Context" and "Regulated Developments in the Area," *Bruguier* discussed the history of the 1894 Act and every significant argument that had been advanced in opposition to reservation disestablishment since *Yankton Sioux Tribe*. The Court concluded the discussion in no uncertain terms.

> In *Greger*, we refrained from interpreting the 1894 Act any broader than necessary. The Supreme Court in *Yankton Sioux Tribe* likewise decided only that the ceded portion of the reservation was diminished. *Today we proceed further . . . We conclude that Pickstown is not Indian country under 18 USC § 1151. It is not situated within the boundaries of a reservation because the Yankton Sioux Reservation was effectively terminated by the 1894 Act.* Nor is it trust land, a dependent Indian community, or property held by the Tribe.

Id. at County App. I, 197 (emphasis added).

In conclusion, we agree with the County that had the comprehensive opinion in *Bruguier* been decided at the time this Court decided *Yankton Sioux Tribe*, the twelve years of remand litigation, instituted by the United States and the Yankton Sioux Tribe since that time, would have been unnecessary and could not have been maintained.

Moreover, *amici* Cities also agree with the State and the County that some type of summary disposition in this case may be appropriate. Petition for Writ of Certiorari of the State of South Dakota at 38, n.9. Petition for Writ of Certiorari of Charles Mix County at 8, n.2. In *Yankton Sioux Tribe*, this Court provided the lower courts with an opportunity to clean up a result that should never have been adopted in the first place. The district court and the court of appeals did not appreciate that opportunity and continued to go down the wrong path, essentially ignoring the direction of this Court in *Yankton Sioux Tribe*. In *Bruguier*, the Supreme Court of South Dakota meticulously adhered to the teachings of this Court in *Yankton Sioux Tribe* in every respect. For that reason, summary consideration in conformity with *Bruguier* seems particularly appropriate at this time.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste

Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

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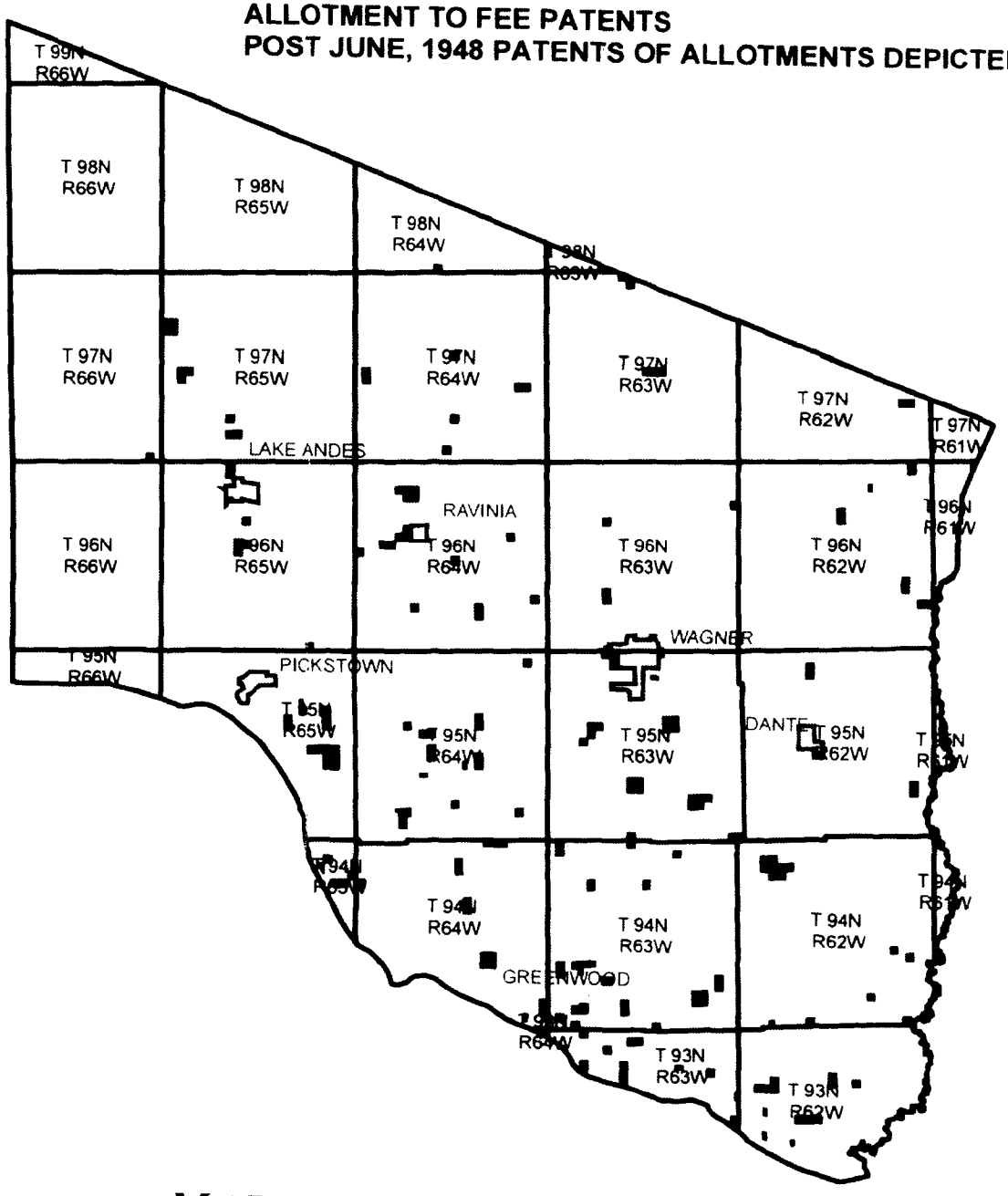
CHARLES MIX COUNTY, SOUTH DAKOTA
POST JUNE 1948
ALLOTMENT TO FEE PATENTS
POST JUNE, 1948 PATENTS OF ALLOTMENTS DEPICTED IN RED



N
W E
S

City Limits
Patents Post June 1948

10/30/2009 nms Charles Mix County
GIS Administrator

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MAP A

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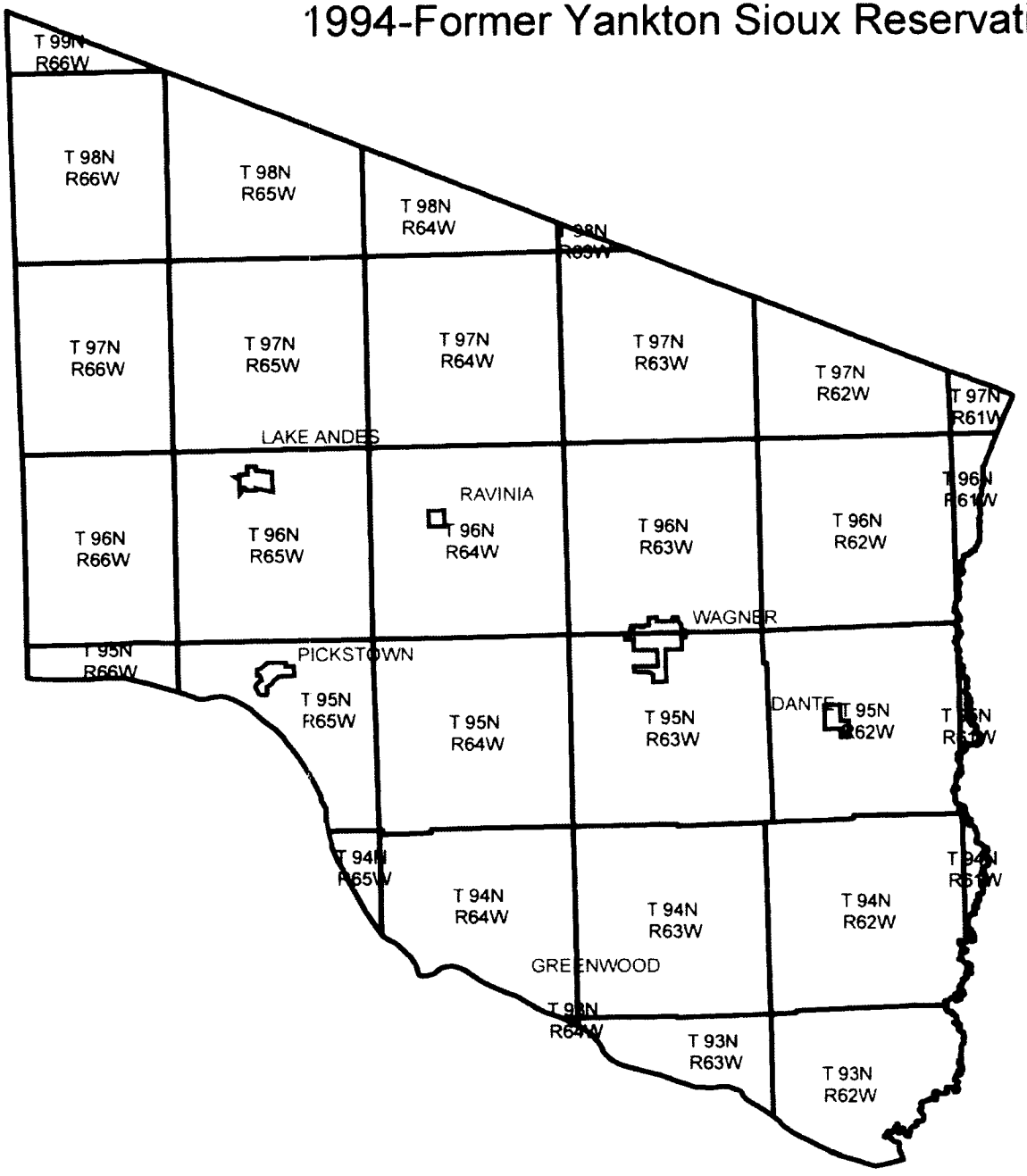
1994-Former Yankton Sioux Reservation



City Limits
Townships

10/30/2009 nms Charles Mix County
GIS Administrator

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MAP B

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1995 District Court Decision
Yankton Sioux Reservation
("Reservation" lands depicted in red)

Townships

10/30/2009 nms Charles Mix County
GIS Administrator

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MAP C

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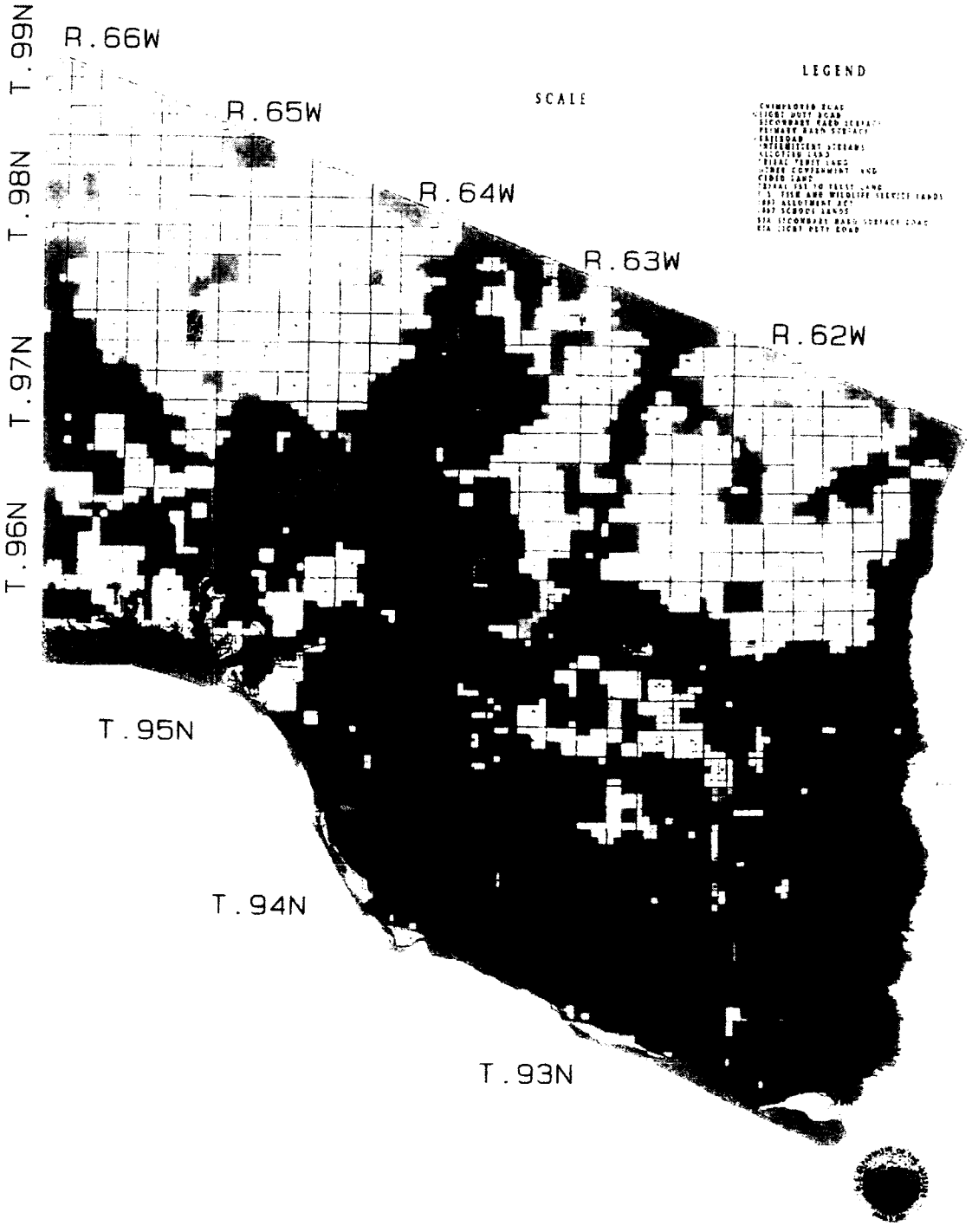

MAP D

1998 District Court Decision Map
("Reservation" includes all areas in red)
Source: Brief of Appellant Yankton Sioux Tribe
in Yankton Sioux Tribe v. Corps of Engineers,
No. 08-2252 (8th Cir.), at Add. 69.

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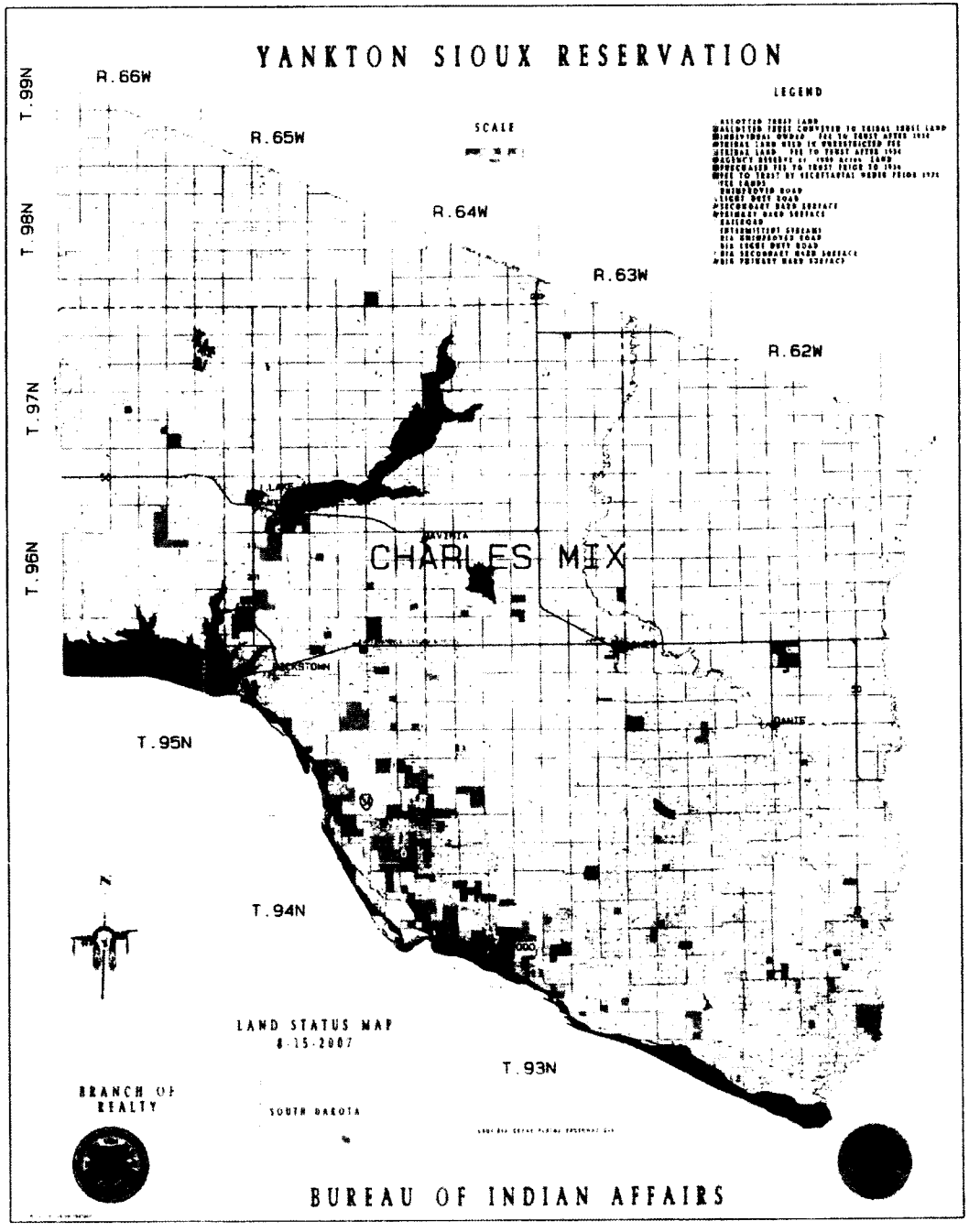
2007 District Court Decision Map
("Reservation" includes all darker squares, except for the blue-grey squares)
Source: Ex. 209 in Yankton Sioux Tribe v. Podhradsky, Civ. 98-4042



MAP E

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2009 Panel Decision
Yankton Sioux Reservation
("Reservation" includes
bright red squares,
and all darker squares,
except those in blue-grey.)

Source: Ex. 209 in Yankton Sioux Tribe v. Podhradsky, Civ. 98-4042, plus the post June 25, 1948
See patents as they are also shown on Map A.
See County description below

City Limits
Patents Post June 1948

10/30/2009 nms Charles Mix County GIS Administrator

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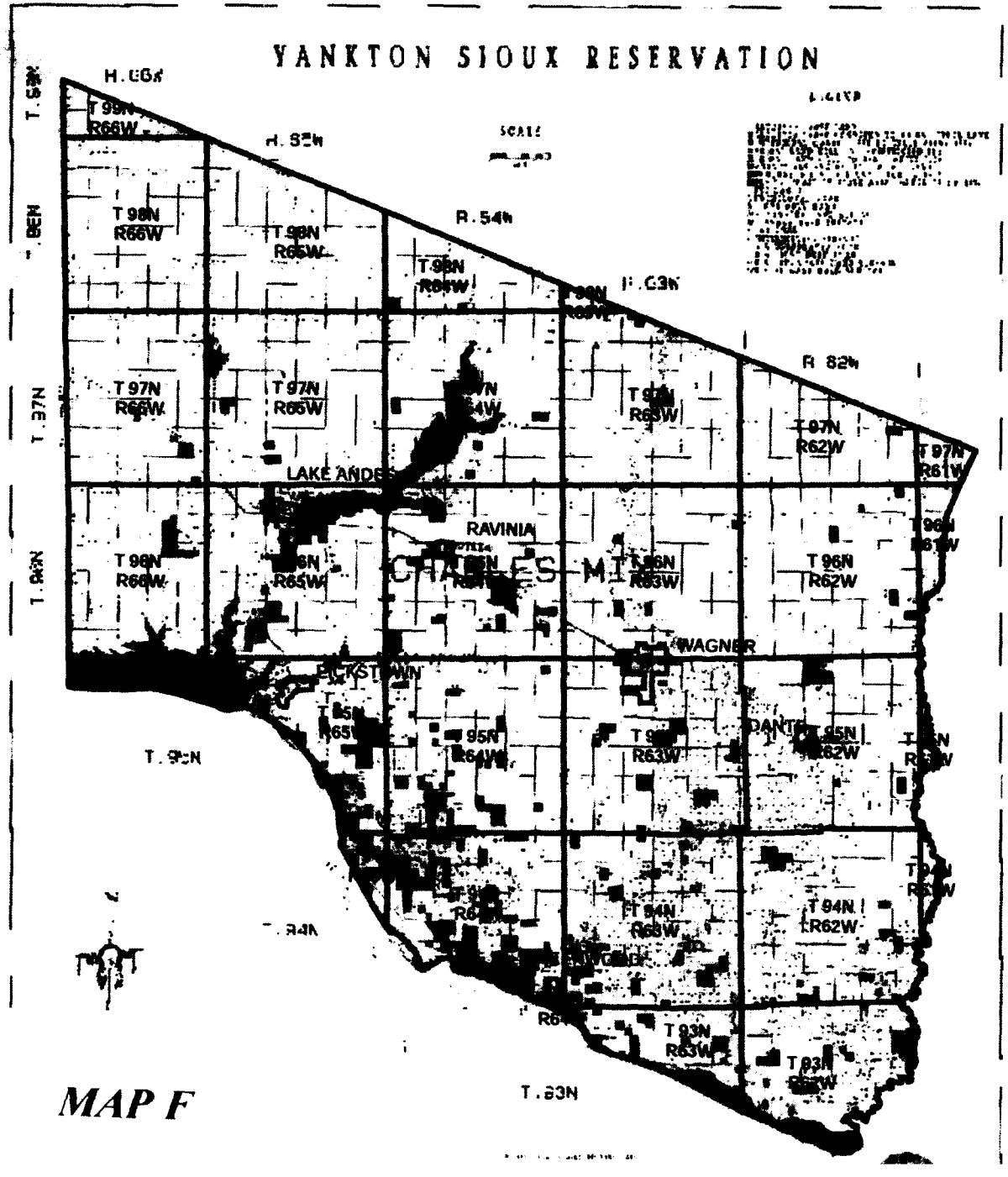

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