No. 10-929

In The
Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA,

Petitioners,

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

REPLY BRIEF OF DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, AND MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Charles.McGuigan@state.sd.us

Counsel for Petitioners
Dennis Daugaard,
Governor of South Dakota,
and Marty J. Jackley,
Attorney General of South Dakota

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Blank Page

INTRODUCTION

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court unanimously reversed an Eighth Circuit decision holding that the 1894 statute ratifying an agreement between the Yankton Sioux Tribe and the United States did not even diminish the Yankton Sioux Reservation. The Court added that, although it was not deciding the issue, the statute's "'cession' and 'sum certain' language is 'precisely suited' to terminating reservation status." *Id.* at 344. On remand, in a series of decisions culminating in *Podhradsky IV*, Pet. App. 1, the Eighth Circuit held that the reservation nonetheless continues to exist – in a configuration unknown to the law, in which the "reservation" has no external boundaries, but in which each parcel of allotted trust and other trust land constitutes its own permanent "mini-reservation." Certiorari is warranted because that decision directly conflicts with a decision of the South Dakota Supreme Court, directly conflicts with *Yankton Sioux Tribe* and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and unsettles the jurisdictional status of more than 40,000 acres of land.

Both the Tribe and the United States nonetheless insist that the case is "factbound" and so does not merit the Court's consideration. The conflicts are genuine, however, as are the real world consequences. The novel patchwork reservation without any external boundaries produced by the Eighth Circuit decision is permanent, for land that is Indian country under 18 U.S.C. § 1151(a) as part of reservation

remains part of the reservation even when sold to non-Indians.

ARGUMENT

A. The Eighth Circuit has decided an important federal question in a way which conflicts with the decision of the South Dakota Supreme Court.

In *Bruguier v. Class*, the South Dakota Supreme Court held that the Yankton Sioux Reservation has been disestablished. Pet. App. 164. In *Podhradsky IV*, the Eighth Circuit held that the Yankton Sioux Reservation has not been disestablished. Pet. App. 1. The conflict could hardly be more direct. The United States nonetheless asserts that the two decisions are not in conflict because the South Dakota Supreme Court's "actual holding" concerned only whether certain former allotted land remained Indian country. U.S. BIO 19. *See* Tribe BIO 22. That position is untenable, and mistakes the legal rule adopted in *Bruguier* (disestablishment) with the court's application of the rule (the former allotted land therefore did not remain Indian country).

Bruguier unequivocally identified the issue before it as whether the reservation had been terminated or disestablished. The court distinguished its earlier decision in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997), which addressed whether the reservation had been *"diminished,"* with the question then before it, which

was whether the reservation was "*disestablished*." Pet. App. 176, n.11. *Bruguier* answered the question by reviewing at length the same materials and factors as the Eighth Circuit did: the history of the reservation, including the Tribe's negotiations with the United States; the provisions of the Yankton Agreement, including the "cession and sum certain" language and Articles VIII and XIV; and the use and treatment of the land in subsequent years. Pet. App. 179-96. Based on its exhaustive analysis, *Bruguier* declared that the "historical context" pointed "to an understanding that the reservation would no longer continue to exist," *id.* at 190; that the language in the Yankton Agreement was equivalent to that of the Lake Traverse Agreement, which "signaled termination," *id.* at 181; that the congressional intent to "terminate" the Lake Traverse Reservation is the "same intent" as "shown in the Yankton Reservation sale," *id.* at 196; and that, in sum, the "Yankton Sioux Reservation was effectively terminated by the 1894 Act." *Id.* at 197.

The South Dakota Supreme Court did not engage in this detailed inquiry on a lark. Rather, its disestablishment holding provided the basis for ruling that the land on which Bruguier committed his crime – allotted land that had passed into the hands of non-Indians – was not Indian country. *See* Pet. App. 176-79, 197. The court recognized that such lands do not constitute Indian country under 18 U.S.C. § 1151(c), and therefore could be Indian country only if they "compose part of a permanent reservation under 18 U.S.C. § 1151(a)." Pet. App. 177. They do not, found

the court, because the reservation no longer exists: it has been disestablished.

It does not matter whether, as the United States and the Tribe insist, the South Dakota Supreme Court could have reached the same result through a different route (by assuming the continued existence of the reservation, but ruling that allotted lands that fell out of Indian hands are not part of it). The court was not obligated to take that different route, and the United States and the Tribe cite no authority for the proposition that a court's ruling on an issue essential to its disposition is not an "actual holding" because Monday morning quarterbacks can posit an alternative line of reasoning.

The Eighth Circuit's decision in *Podhradsky IV* directly conflicts with the South Dakota Supreme Court's decision in *Bruguier*. And as the Petition explained, Pet. 19, conflicts between federal courts of appeal and state high courts are a primary basis for this Court's certiorari jurisdiction.

B. The Eighth Circuit's decision conflicts with *Yankton Sioux Tribe* and *DeCoteau*.

Yankton Sioux Tribe, 522 U.S. at 344, found that the "terms of the 1894 [Yankton] 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 Yankton Act ratified a negotiated agreement supported by a majority of the Tribe." The Eighth Circuit decision

cannot be reconciled with that finding, *see* Pet. 20-26, and the United States' and the Tribe's effort to defend it fails.

Both the United States and the Tribe attempt to avoid *DeCoteau* by arguing that the 1894 Yankton Agreement and its "cession and sum certain" language concerned only the ceded land. U.S. BIO 14; Tribe BIO 13. That was not true in *DeCoteau*, and it is not true here. This Court found, as did the Eighth Circuit, that the language of the 1894 Yankton Act removed the external boundaries of the reservation, disproving the notion that the Act concerned only a land purchase. *Yankton Sioux Tribe*, 522 U.S. at 345-47; *Gaffey II*, Pet. App. 203, 223, 224, 248. Moreover, the removal of the boundaries in itself ought to have disposed of the case, for there is no precedent for a finding that Congress meant to create hundreds of mini-reservations within borders it had removed, as *Podhradsky IV* found. *See generally Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998).

The Tribe suggests that the *Podhradsky IV* configuration is typical, citing *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989); and *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1530. Tribe BIO 30. Those cases are easily distinguishable because in each the external boundaries remained intact. Further, the Tribe cites no authority in support of its distinguishable Red Lake Reservation claim (or its other claims). *Id. See Nord v. Kelly*, 520 F.3d 848, 857-59 (8th Cir. 2008) (Murphy, J. concurring) (Red Lake Reservation has

"unique legal status"; area was never ceded and "all lands are held communally by the tribe.").

Both the United States and the Tribe find special importance in the Commissioner's perceived emphasis on the cession, from the Tribe, of only *unallotted* lands. U.S. BIO 16; Tribe BIO 4. The argument ignores that the Tribe had available for sale *only* the unallotted lands, owned by the Tribe. Allotment had eliminated "any tribal property interest" in the allotted lands and allotted lands could not be sold by the Tribe. Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* 195 (2005 Ed.). *See also Gaffey II*, Pet. App. 209. The United States, by first allotting the area and then acquiring the remaining unallotted land, eliminated the tribe's land in common. The Commissioners accordingly told Congress "'now that [members of the Tribe] have been allotted their lands . . . and have sold their surplus land – the last property bond which assisted to hold them together in their tribal interest and estate – their tribal interests may be considered a thing of the past.'" S. Ex. Doc. No. 27, 53d Cong., 2d Sess., 19 (1894), quoted at *Yankton Sioux Tribe*, 522 U.S. 353. In sum, allotment and cession worked in tandem to completely eliminate the tribe's "land in common" – a "critical component of reservation status." *Yankton Sioux Tribe*, 522 U.S. at 345. *See also Gaffey II*, Pet. App. 229-30.

Both the Tribe and the United States focus on the subsidiary language of the 1894 Act in an attempt to denigrate its operative "cession and sum certain" language. *Yankton Sioux Tribe*, 522 U.S. at 333.

See, e.g., U.S. BIO 7, 15-16; Tribe BIO 5, 13-14. The actual text and meaning of the subsidiary provisions, however, reveal that they too support disestablishment. For example, Article V provides potential funding for "courts of justice and other local institutions." Pet. App. 340-41. The Article provides support for "local," i.e., city, county and state, courts and institutions, not "tribal" courts and institutions, and thus surely does not support continued reservation status. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 697 n.16 (1993).

Nor does the temporary withholding from sale to settlers of roughly 1,000 ceded acres for agency, school and other purposes as provided by Article VIII of the 1894 Act, Pet. App. 342-43, signal the continual existence of a "reservation." This Court did note that the language "counsel[ed]" for that result, *Yankton Sioux Tribe*, 522 U.S. at 350, but nonetheless found that the Act removed the boundaries and at least diminished the reservation. A more complete record, moreover, reveals that retention of such areas was "common, even for a terminated reservation." *Bruguier*, Pet. App. 187. For example, such lands were also reserved at the disestablished Lake Traverse Reservation. *DeCoteau*, 420 U.S. at 435, n.16, 438 n.19. *See also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 622 (1977) (Marshall, J. dissenting) (reservation of land allowed for "Indian schools, religious missions and service agencies" in disestablished areas); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from

reservation); 36 Stat. 440 (1910) (allowing Secretary to reserve lands for "agency, school, and religious purposes" in area of Pine Ridge Reservation held disestablished in *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975)).

The liquor provision, Article XVII, Pet. App. 347, likewise does not support reservation status. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47, found that a similar provision supported disestablishment of the area in question. The same should be true here.

Finally, the United States and the Tribe attempt to distinguish the negotiating history of the Lake Traverse disestablishment from that at Yankton by focusing on a press report quoted at *DeCoteau*, 420 U.S. at 433. U.S. BIO 22; Tribe BIO 18. This focus ignores the equally or more potent letter indicating disestablishment of 100 Yankton chiefs and tribal members in which they concurred with the Commissioner's understanding that "cession of the surplus lands dissolved governance of the 1858 reservation," *Yankton Sioux Tribe*, 522 U.S. at 353, quoting S. Ex. Doc. 27, 19, and they wanted "'the laws of the United States and the State to be recognized and observed.'" *Yankton Sioux Tribe*, 522 U.S. at 353, quoting S. Misc. Doc. 134, 53d Cong., 2d Sess., 1 (1894).

C. The conflict in holdings between the State and Federal courts makes a significant difference.

Belying their 16 years of advocacy, both the United States and the Tribe argue that it does not matter whether the Yankton Sioux Reservation has been disestablished. U.S. BIO 24-30; Tribe BIO 26-27. They latch onto the State's acknowledgment that the 30,000 acres of allotted lands within the former reservation boundaries are "Indian country" under 18 U.S.C. § 1151(c), as "allotments, the Indian titles to which have not been extinguished." Because all agree that the allotments are "Indian country," the argument goes, there is no real dispute as to that land. The United States and the Tribe are wrong for two reasons.

First, as the Tribe acknowledges, the critical difference between "reservation" land and "allotted" land is *permanence*:

> The practical difference between Indian country under § 1151(a) and § 1151(c) is that Indian country within the former remains part of the reservation even when sold to non-Indians, whereas Indian country under the latter loses its Indian country status upon any sale to a non-Indian going forward.

Tribe BIO at 26.

Podhradsky IV also recognized this distinction, finding that the "outstanding allotments" qualified as "reservation" under 18 U.S.C. § 1151(a), Pet. App. 50-51, such that, after 1948, allotments would retain

"reservation" status after the trust patent was "terminated" and the land was conveyed "in fee simple" to non-Indians. *Id.* at 28. The United States nonetheless insists that the matter is unimportant because relatively few parcels of land have recently passed out of allotted status, so the permanence of allotted lands is not a problem. U.S. BIO 25. But 5,900 acres have left that status since the pivotal date of 1948. Moreover, the United States cannot guarantee that there will be no further shifts in federal Indian policy, or that individual members of the Tribe will uniformly decline to sell their property. The Tribe and tribal members may reasonably perceive that retaining land in trust significantly sacrifices marketability and productivity, and therefore decide to convert their land to fee status. *See, e.g.*, Terry Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians* (1995) at 127 ("per-acre value of agricultural output was found to be 85 to 90 percent lower on tribal trust land than on fee simple land and 30 to 40 percent lower on individual trust land than on fee simple land"). In a recent year, over 260,000 acres were removed from trust status nationally. 2007 Ex. 130 at 9, n.8. There is no reason to believe that similar sales of allotted or other trust lands will not take place in this area.

Second, the status of the 5,900 acres which have left allotted status since 1948 and which are now owned by non-Indians has been placed in dispute. Under the South Dakota Supreme Court's decision in *Bruguier*, those 5,900 acres are definitively *not* part

of a reservation and are *not* Indian country because the reservation has been disestablished. Under the Eighth Circuit's decision, by contrast, the status of those 5,900 acres is now up in the air. Even after the court amended its opinion to delete the footnote declaring those lands to be reservation, its opinion leaves open that later it will so hold. *See Podhradsky IV*, Pet. App. 26-28, 50-51. As a consequence, if this Court declines to grant review, the jurisdictional status of that land will be an open question and years of litigation will inevitably follow – even though South Dakota has been litigating for 16 years to resolve definitively that the reservation is no more.

The United States also insists that the status of the 5,900 acres is not before the Court because their status was not actually "'litigated.'" U.S. BIO 30. *See also* Tribe BIO 29. This claim ignores the State's consistent legal position, spanning 16 years, that the entire reservation has been "disestablished." *See, e.g.*, Answer of State of South Dakota, Civ. No. 94-4217, Joint Appendix, S.Ct. No. 96-1581 at 86; *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439, 1443 n.4 (8th Cir. 1996) (South Dakota's "core argument is that the 1894 Act eliminated the reservation"); Answer and Counterclaim of Defendants Governor William Janklow and Attorney General Mark Barnett, Civ. 98-4042, Doc. 31 (prayer for "judgment declaring that all lands within the 1858 boundaries . . . have lost 'Indian country' and 'reservation' status pursuant to 18 U.S.C. § 1151(a))"; *Podhradsky IV*, Pet. App. 19 (South Dakota and other

parties "continue to argue" that "reservation has been completely disestablished"). Precisely what more South Dakota could have done to "litigate" the issue is not clear.

The jurisdictional cloud covering those 5,900 acres is severe. If the South Dakota Supreme Court is correct, the parcels are not Indian country, and are therefore subject entirely to state and local control. If the Eighth Circuit decision is left unreviewed, the Tribe, the United States, the parcels' owners, or any person can claim that the lands are "reservation." The lands are therefore subject to dispute as to whether federal or tribal jurisdiction, rather than state and local jurisdiction, applies to any crime by or against an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Similarly, state and local civil jurisdiction over activities on such lands will be called into question, for the State loses substantial civil jurisdiction in Indian country. *See Williams v. Lee*, 358 U.S. 217 (1959). The State's ability to impose taxes would also be subject to challenge. *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973). The Eighth Circuit ruling will inevitably produce protracted litigation in the state, tribal and federal courts with regard to both criminal and civil matters. *See also Amicus Curiae* Brief for Colin Soukup, et al., Nos. 10-929/10-931/10-932; *Amicus Curiae* Brief of Wagner Community School District No. 11-4 in Support of Petitions for Writ of Certiorari, Nos. 10-929/10-931/10-932; Brief of Randall Community Water District, *Amicus Curiae*, in Support of

Petitions for Writ of Certiorari, Nos. 10-929/10-931/10-932 (all detailing practical concerns of Amici). This Court's review is amply warranted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES D. MCGUIGAN*
Chief Deputy Attorney General
STATE OF SOUTH DAKOTA

**Counsel of Record*

JOHN PATRICK GUHIN
KIRSTEN E. JASPER
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Charles.McGuigan@state.sd.us

Counsel for Petitioners
Dennis Daugaard,
Governor of South Dakota,
and Marty J. Jackley,
Attorney General of South Dakota

Blank Page