Nos. 99-1490 and 99-1683

# In the Supreme Court of the United States

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

*v.*

YANKTON SIOUX TRIBE, ET AL.

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

*v.*

MATT GAFFEY, ET AL.

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Yankton Sioux Reservation, which this Court held in *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), had been diminished to the extent of those lands that had been ceded to the United States for sale to non-Indian settlers, has been wholly disestablished.

2. Whether the Yankton Sioux Reservation has been further diminished to the extent of those allotted lands that have passed out of Indian ownership.

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## OPINIONS BELOW

The opinion of the court of appeals (State Pet. App. 1-49) is reported at 188 F.3d 1010.[1] The opinion of the district court (State Pet. App. 50-113) is reported at 14 F. Supp. 2d 1135.

[1] References to "State Pet. App." are to the Appendix in No. 99-1490 filed by the State of South Dakota.

## JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. The petitions for rehearing were denied on December 8, 1999 (State Pet. App. 114). The State's petition for a writ of certiorari was filed on March 8, 2000. The Tribe's petition for a writ of certiorari was filed on March 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In the Treaty of April 19, 1858, 11 Stat. 743 (State Pet. App. 115-126), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, comprising about 13 million acres, except for a 430,000-acre Reservation in what is now Charles Mix County in southeastern South Dakota. State Pet. App. 8, 54-55. Subsequently, the United States made allotments of reservation lands to the individual members of the Yankton Sioux Tribe, pursuant to the General Allotment Act, ch. 119, 24 Stat. 388, and the Act of February 28, 1891, ch. 383, 26 Stat. 794. Ultimately, more than 262,000 acres were allotted. State Pet. App. 8 & n.3, 64.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Yankton Sioux for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, the tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which they agreed to "cede, sell, relinquish, and convey" all of their interest in the unallotted lands within the Reservation for $600,000. State Pet. App. 128-129. The unallotted ceded lands totaled approximately 168,000 acres. *Id.* at 64. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act) (State Pet. App. 127-140).

2. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Yankton Sioux Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act by which the Tribe ceded all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; see *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).[2]

The parcel of land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act. The Court therefore found it unnecessary to decide whether the Yankton Sioux Reservation had been wholly disestablished. The Court explained that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us * * * to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." 522 U.S. at 358.

3. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive

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[2] The Court concluded that "the contemporary historical context," while supporting its conclusion that Congress intended to diminish the Reservation, was "not so compelling that, standing alone, it would indicate diminishment." 522 U.S. at 351. The Court further concluded that the subsequent conduct of the United States, the State, and the Tribe "reveals no consistent, or even dominant, approach to the territory in question," and therefore "carries but little force in light of the strong textual and contemporaneous evidence of diminishment." *Id.* at 356 (internal quotation marks omitted).

relief precluding the State and Charles Mix County from exercising criminal jurisdiction over tribal members on (i) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual Indians, and (ii) those ceded lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, but that are now held in trust by the United States for the Tribe. The United States, which had previously participated in No. 94-4217 as an amicus curiae, intervened in the consolidated action. State Pet. App. 6-7.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. State Pet. App. 53. Instead, the court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within its original exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of the negotiations between the United States Commissioners and the Yankton Sioux, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 67-109.

As a consequence of the district court's decision, the original Reservation, which comprised some 430,495 acres, would be reduced to approximately 262,000 acres. State Pet. App. 64. The district court recognized that its decision would create "a checkerboard pattern of jurisdiction," because the Indian allotments were spread throughout the

original Reservation. *Id.* at 109. The court noted that a similar jurisdictional pattern had been approved in *Ute Indian Tribe* v. *Utah*, 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998).

4. The court of appeals affirmed in part and reversed in part. State Pet. App. 1-49. The court agreed with the district court that the Yankton Sioux Reservation had not been disestablished. But the court held that the Reservation had been further diminished to exclude not only the unallotted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe* but also those allotted lands that passed out of trust status and are now owned by non-Indians.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. State Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain'" from the text of the statute, the legislative history, or the surrounding circumstances. *Ibid.* (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Indians. *Id.* at 30 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to disestablish or diminish a reservation "must be analyzed individually, its effect depending on the language

used and the circumstances of its passage." *Id.* at 29 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. State Pet. App. 30-41,

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." State Pet. App. 30. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court perceived that Article V, which provided for a $50,000 fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 39. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 39-40. And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 40.

The court of appeals likewise found no clear indication of an intent to diminish the Yankton Sioux Reservation in the record of the negotiations between the United States and

the Tribe. State Pet. App. 32-36. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 33. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers"; for example, the Commissioners had suggested that the Tribe, after selling its surplus lands, might be able to have the Reservation organized as a separate county, in which the Tribe could govern its own members so long as they obeyed the laws of the State. *Id.* at 34. The court viewed such statements as "suggest[ing] the parties did not intend to disestablish the reservation." *Ibid.* The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 36-37. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 37.

c. The court of appeals nonetheless concluded that Congress intended to diminish the Reservation not only by the land ceded in 1894, but also by any lands that would later pass into the hands of non-Indian settlers. State Pet. App. 43. Accordingly, the court "h[e]ld that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 47. The court did not point to any express statement in the 1894 Act, the 1892 Agreement, the negotiation records, or the legislative history to support that conclusion. Instead, the court reasoned that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands, gain the ability to sell those lands to non-Indians, and

become subject to the civil and criminal laws of the State. *Id.* at 43. The court also observed that "nothing in [the] text [of the 1894 Act] or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non[-]Indians who purchased land after it lost its trust status." *Id.* at 42. The court found additional support for its conclusion in the absence of any evidence that the United States or the Tribe had asserted jurisdiction until the 1990s over formerly allotted lands that were no longer held in trust. *Id.* at 45-46.

The court of appeals did not determine precisely which lands, after excluding the ceded lands and the allotted lands owned by non-Indians, remain within the surviving Yankton Sioux Reservation. The court concluded only that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe" retains its reservation status. State Pet. App. 48. The court remanded the case to the district court for a complete determination of which other lands remain a part of the Reservation. *Ibid.*

**ARGUMENT**

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. Nevertheless, the court's decision does not warrant this Court's review, at least not at this interlocutory stage of the case. The court purported simply to apply, to the particular circumstances of this case, the rules of law previously announced by this Court in earlier disestablishment and diminishment cases. The court's decision does not squarely conflict with any decision of this Court or any other court of appeals. Nor, contrary to the State's suggestion, does the decision conflict with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999). Indeed, the actual holding in *Bruguier*—that allotted lands

within the original Yankton Sioux Reservation that are now owned by non-Indians are not Indian country under 18 U.S.C. 1151—is fully consistent with the actual holding in this case. Neither the Eighth Circuit nor the South Dakota Supreme Court reached any definitive conclusion as to precisely which other lands within the original Reservation retain their status as Indian country. No such lands were at issue in *Bruguier*, and, here, the court of appeals remanded the case for further proceedings on that question. If a conflict should develop between the Eighth Circuit and the South Dakota Supreme Court concerning the Indian country status of particular lands within the original Reservation, or if the Eighth Circuit's decision concerning the progressive diminishment of this particular Reservation should prove to have consequences for other Reservations, there will be time enough for this Court to grant review at a later date.

### A. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Not Been Disestablished Does Not Merit This Court's Review

1. In concluding that the Yankton Sioux Reservation has not been wholly disestablished, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not ordinarily merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (State Pet. App. 26, 29-30), Congress's intent to diminish or disestablish a reservation must be "clear and plain," as reflected in the text of the surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v.

*Bartlett*, 465 U.S. 469, 470-471 (1984).[3] There is no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation.

The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members.

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted lands would result in the disestablishment of the entire Reservation. Indeed, several provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (State Pet. App. 132). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the

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[3] The Court has also stated that the inquiry into disestablishment or diminishment may, "to a lesser extent," be informed by "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411).

federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." State Pet. App. 40.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (State Pet. App. 136). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see State Pet. App. 40 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (State Pet. App. 130). Article XI provided an additional source of funding of those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (State Pet. App. 133-134). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. State Pet. App. 39.[4]

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[4] As the court of appeals noted (State Pet. App. 39), the fund referred to in Articles V and XI was never actually established.

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. State Pet. App. 33-34 (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1874)). That purpose was consistent with the continued existence of a Reservation consisting of the allotted lands. The Commissioners also indicated that the Tribe would retain some governing powers after the cession, suggesting to the tribal members, for example, that "after you sold your lands, you could have this reservation organized as a separate county," and thus "you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* at 34 (quoting S. Exec. Doc. No. 27, *supra*, at 48). The court of appeals observed that the Yankton Sioux could have interpreted such statements to mean that the cession would not alter the Tribe's control over lands retained by the Indians. The court viewed such statements, which it characterized as "references to a continuing tribal government," as suggesting that "the parties did not intend to disestablish the reservation." *Ibid.*

The negotiation records were submitted to Congress by the Secretary of the Interior to support the ratification of the 1892 Agreement. State Pet. App. 33. The congressional debates on the ratification did not address the status of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little" even with respect to the status of the ceded lands).

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances. State Pet. App. 41. No reason exists for this Court to revisit that conclusion.[5]

2. The State contends (Pet. 11-20) that the court of appeals' decision conflicts with the South Dakota Supreme Court's recent decision in *Bruguier* (State Pet. App. 141-172), and with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The State is mistaken.

a. Contrary to the State's assertion of a conflict between the decision below and the South Dakota Supreme Court's decision in *Bruguier*, the actual holdings of the two cases are identical—*i.e.*, that allotted lands within the exterior boundaries of the original Yankton Sioux Reservation that are now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

Section 1151 identifies three categories of land that qualify as Indian country: reservations (18 U.S.C. 1151(a)), dependent Indian communities (18 U.S.C. 1151(b)), and allotments that remain in trust or restricted status (18 U.S.C. 1151(c)). The question whether territorial jurisdiction rests with the United States and the Tribe, on the one hand, or the State, on the other, turns on whether the land in question is Indian country, not on the particular category of Indian country into which the land is classified. See, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S.

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[5] As discussed below (pp. 21-27, *infra*), although the court of appeals did err in concluding that the Reservation was further diminished to the extent of allotted lands that have passed out of Indian hands, that aspect of the court's decision likewise does not merit review.

520, 526-527 & n.1 (1998). That is expressly so under 18 U.S.C. 1151-1153 with respect to criminal jurisdiction, the principal subject of concern in this case and *Bruguier*. And the definition of Indian country in 18 U.S.C. 1151 "generally applies to questions of civil jurisdiction" as well. *Native Village of Venetie*, 522 U.S. at 527; *DeCoteau*, 420 U.S. at 427 n.2.[6]

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. State Pet. App. 142-143. In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 142.

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[6] For example, the same general principles of immunity from state taxation apply on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); or is an allotment still held in trust or restricted status, see *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

The court then concluded that allotted lands that now are owned by non-Indians do not constitute Indian country. *Ibid.*[7]

The court of appeals in this case likewise held that formerly allotted lands that now are owned by non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." State Pet. App. 47. Accordingly, under the holdings of both the South Dakota Supreme Court and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier* and indeed over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership. Thus, as to those lands, which total approximately 222,000 of the 262,000 acres of allotted lands on the Reservation (see State Pet. 5), the Eighth Circuit and the South Dakota Supreme Court agree that the lands are *not* Indian country.

Nor is any disagreement evident between the Eighth Circuit and the South Dakota Supreme Court with respect to the Indian country status of other lands within the original exterior boundaries of the Yankton Sioux Reservation. The South Dakota Supreme Court in *Bruguier*, for example, recognized that lands that are held in trust by the United States for the Tribe or its individual members are Indian country. See State Pet. App. 153, 155, 167, 171-172. The Eighth Circuit, while remanding for a determination of which trust lands remain part of the diminished Reservation, did not dispute that all such lands are Indian country. It is

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[7] No question was presented in *Bruguier* as to whether the land at issue was a "dependent Indian communit[y]" under 18 U.S.C. 1151(b), and the parties stipulated that the land was not an "Indian allotment[], the Indian title[] to which ha[d] not been extinguished," under 18 U.S.C. 1151(c). See State Pet. App. 142-143, 153-154. Nor was the court of appeals in this case presented with any question as to whether any lands within the original Yankton Sioux Reservation constitute dependent Indian communities.

irrelevant *why* lands held in trust by the United States for the Tribe or its individual members are Indian country—*i.e.*, whether, as the South Dakota Supreme Court appeared to believe, the lands taken into trust for the Tribe since 1894 are Indian country because they are "informal" reservations under 18 U.S.C. 1151(a), see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), and the allotments held in trust for individual Indians are Indian country under 18 U.S.C. 1151(c), or whether, as the Eighth Circuit appeared to believe, the tribal trust lands and the allotments that remain in trust status are Indian country because they are the remnants of a "formal" (*i.e.*, the original) reservation. The essential point at this stage is that both courts agree that the allotted lands that have passed out of trust status and are now in non-Indian ownership *are not* Indian country, while both courts have indicated (but not yet definitively held) that all lands held in trust for the Tribe or individual Indians members within the boundaries of the original Reservation *are* Indian country.[8]

The decision of the court of appeals in this case thus does not present a true conflict—*i.e.*, a "conflict[] with a *decision* by a state court of last resort," Sup. Ct. R. 10(a) (emphasis added)—of the sort that warrants this Court's review. This Court reviews "judgment[s], decree[s], or order[s]" of lower courts, not the reasoning upon which such judgments, decrees, or orders are based. 28 U.S.C. 2106.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Traverse

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[8] The resulting jurisdictional pattern—with federal and tribal jurisdiction over individual allotments and parcels of tribal trust land—is essentially the same as that involved in a number of this Court's decisions, including *DeCoteau*, *Citizen Band Potawatomi Tribe*, and *Sac & Fox Nation.*

Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ, in several significant respects, from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of March 3, 1891, ch. 543, 26 Stat. 989 (1891 Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The 1891 Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The 1891 Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28

Stat. 318; see *Yankton Sioux Tribe* (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the 1891 Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the 1891 Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate the Reservation. For example, the Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.17. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." State Pet. App. 23.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the General Allotment Act or was received by the Yankton Sioux under the 1894 Act. The General Allotment Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. State Pet. App. 61. In contrast, each Sisseton-Wahpeton *member*, "regardless of age or sex," received a 160-acre

allotment. *DeCoteau*, 420 U.S. at 435; see also *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed from the agreement here, because the Sisseton-Wahpeton, "in exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." State Pet. App. 23. The Yankton Sioux did not.

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The State finally asserts (Pet. 20-26) that the court of appeals erroneously concluded that three types of trust land "retained, or may have retained, reservation status": (i) the so-called "agency lands," which were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe; (ii) any allotted lands that remain in trust; and (iii) any lands acquired by the United States since 1934 and held in trust for the Tribe or individual Indians pursuant to 25 U.S.C. 465. No issue concerning the status of such lands warrants the Court's review at this time. Indeed, the court of appeals explicitly deferred any determination with respect to the status of two of the three categories of trust lands identified by the State. State Pet. App. 48.

The court of appeals made only one definitive ruling with respect to trust lands: that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under [18 U.S.C.] 1151(a)." State Pet. App. 48. The court did not articulate its rationale for that determination. Contrary to the State's suggestion (Pet. 20-22), however, the court of appeals' determination is consistent with decisions of this Court. In *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511, the Court considered the status of lands that were not within the boundaries of a formally recognized Reservation but that were held in trust by the United States for the benefit of the Tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.*; see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

It is thus of no present consequence whether, as the State contends, the agency lands were necessarily severed from the Reservation in 1894. Nothing in this Court's decisions, including *Yankton Sioux Tribe*, precludes such lands from subsequently gaining reservation status if taken into trust by the United States for the benefit of the Tribe. The State's assertion (Pet. 21) that the court of appeals' ruling with respect to the agency lands "contradicts the direct holding of *Yankton Sioux Tribe*" is therefore erroneous.

The State's concerns with respect to other categories of trust lands are premature. Because the court of appeals could not determine from the record or from counsel at oral argument what other trust lands remain within the original boundaries of the Yankton Sioux Reservation, the court remanded the matter to the district court "to make any necessary findings relative to the status of Indian lands which are held in trust." State Pet. App. 48. Indeed, in describing the court of appeals' decision as providing that such trust lands "may" or "might" possess reservation status (Pet. 20, 22, 24, 25), the State effectively concedes that questions concerning the status of those lands are not ripe for this Court's review. And for that reason, even if the Court were to grant the State's petition and agree with the State that the original Yankton Sioux Reservation was disestablished by the 1894 Act, the case would not furnish a suitable vehicle for definitively resolving the Indian country status of all lands within the boundaries of the original Reservation.

### B. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Been Further Diminished Does Not Merit This Court's Review

We agree with the Tribe that the court of appeals erred in holding that the Yankton Sioux Reservation has been further diminished to the extent that allotted lands have passed out of Indian ownership. But we did not ourselves seek certiorari on that issue because, on balance, we concluded that the court's decision, while of undeniable significance to the parties here, is not of sufficiently general significance to warrant this Court's review, at least not at this interlocutory stage of the case. We adhere to that judgment now.

1. The court of appeals correctly recognized that "[c]ongressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands," State

Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977)); that Congress's intent to diminish or disestablish a reservation must be "clear and plain," *ibid.* (quoting *Dion*, 476 U.S. at 738); and that such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *ibid.* (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). This Court has consistently invoked those same principles in determining whether a particular reservation has been diminished.

The court of appeals, however, did not apply those principles correctly to the facts of this case. The court did not identify any language in the 1894 Act or the 1892 Agreement that "clear[ly] and plain[ly]" evinces an understanding that allotted lands would be separated from the Yankton Sioux Reservation when they passed out of trust status and were sold to non-Indians. Nor did the court identify such language in the negotiation records or the other legislative history. Cf. State Pet. App. 37 (noting that the U.S. Commissioners' reports on the negotiations with the Yankton Sioux "do not * * * mention any transfer of the Yanktons' tribal sovereignty").

Rather, the court of appeals relied on provisions of the 1894 Act, "read in its full historical context," that anticipated that tribal members would eventually receive fee title to their allotments, gain the ability to sell the allotments to non-Indians, and become taxpaying citizens of the State. State Pet. App. 42-43. For example, the court noted that Article V of the 1894 Act, which provided for a fund to support "local institutions for the benefit of [the] tribe," stated that the fund would be distributed once the Yankton Sioux "shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship." *Id.* at 39, 42 (quoting 28 Stat. 315). The court viewed Article V as "contemplat[ing] a future in which such a fund would not be

needed," *id.* at 39, presumably because tribal members, as citizens, would then have access to state institutions. Such provisions do not, in our view, provide the requisite "clear and plain" indication of Congress's intent to diminish the Reservation.

We submit that the court of appeals' holding on the diminishment issue, while erroneous, is not erroneous in a manner that requires this Court's review at this time. The Eighth Circuit's disposition of the diminishment issue, like its disposition of the disestablishment issue, involves nothing more than the application of settled principles of law to the particular facts of this case. This Court rarely grants certiorari where, as here, the court of appeals' error appears to consist solely of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

2. The Tribe contends that the court of appeals' decision on the diminishment issue conflicts with various decisions of this Court and with a decision of the Tenth Circuit. We do not, however, perceive any square conflict with any of the decisions cited by the Tribe.

a. The court of appeals' holding that the Yankton Sioux Reservation has been further diminished does not, as the Tribe suggests (Pet. 9-14), conflict with any decision of this Court. To the extent that the Tribe relies on this Court's cases that presented diminishment claims, those cases concerned different reservations, different statutes opening those reservations to non-Indian settlement, and different circumstances surrounding the enactment of those statutes. See, *e.g.*, *Solem*, 465 U.S. at 472-481 (1908 Act opening the Cheyenne River Sioux Reservation for homesteading did not diminish the Reservation, but simply permitted non-Indians to settle within existing reservation boundaries); *Mattz*, 412 U.S. at 494-506 (1892 Act opening the Klamath River Reservation for homesteading did not diminish that Reservation). As noted above, the Court has repeatedly recognized that

the question whether a reservation has been diminished turns on the particular "language of the Act [opening the Reservation to settlement] and the circumstances underlying its passage." *Solem*, 465 U.S. at 469; accord *Hagen*, 510 U.S. at 410.

Other cases cited by the Tribe did not concern, as does this case, whether the original reservation boundaries continued to exist. Those cases instead concerned whether persons or activities on lands indisputably within the existing reservation boundaries were subject to regulation by the United States, the State, or the Tribe. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 557-567 (1981) (Crow Tribe had no authority to regulate non-Indian fishing and hunting on reservation lands owned in fee by non-members of the Tribe); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-483 (1976) (State had no authority to impose personal property tax on Indians residing within the Flathead Reservation, to impose license fee on Indians conducting tribal business within the Reservation, or to impose sales tax on sales by Indians to Indians within the Reservation; State could require Indian retailers to collect tax on sales to non-Indians within the Reservation); *United States* v. *Celestine*, 215 U.S. 278, 283-291 (1909) (United States had authority to prosecute a murder committed by an Indian on a trust allotment within the Tulalip Reservation). No conflict exists between the holdings of those cases and the holding of the Eighth Circuit in this case.[9]

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[9] The Tribe also suggests (Pet. 15-17) that the decision below conflicts with 18 U.S.C. 1151(a), which defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The court of appeals did not acknowledge any tension between Section 1151(a) and its holding that the Yankton Sioux Reservation was diminished by the sale of former allotments to non-Indians. The court may have viewed Section 1151(a) as not applying to the threshold question,

b. Nor does the court of appeals' decision conflict, as the Tribe suggests (Pet. 20-22), with the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe II*), 114 F.3d 1513 (1997), cert. denied, 522 U.S. 1107 (1998). As explained below, *Ute Indian Tribe II* arose in unusual circumstances that are not presented here.

In *Hagen* v. *Utah*, the Court held that the Uintah Reservation had been diminished as a result of 1902 and 1905 statutes that allotted lands within the Reservation to members of the Ute Indian Tribe and restored the remaining lands to the public domain. 510 U.S. at 421-422. The Court thereby resolved a conflict between the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe I*), 773 F.2d 1087 (1985) (en banc) cert. denied, 479 U.S. 994 (1986), which held that the Reservation had not been diminished, and subsequent decisions of the Utah Supreme Court holding that the Reservation had been diminished. See *Hagen*, 510 U.S. at 408-409 (noting conflict).

While *Hagen* was pending, the Ute Indian Tribe moved in district court to enjoin the State from exercising jurisdiction on lands within the Uintah Reservation in a manner incon-

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presented in this case, of what "the limits of [an] Indian reservation" are. The court may instead have viewed Section 1151(a) as applying only after such limits have been ascertained (and thus as not precluding a determination that Congress intended that the limits of a particular Reservation would change with the transfer of fee-patented land out of Indian hands). Section 1151(a), if construed in such a manner, would not conflict with the decision below. We are aware of no decision of this Court or any court of appeals squarely accepting or rejecting such a construction of Section 1151(a). If the decision below proves to have a broader impact with respect to other existing Reservations where allotments have passed out of trust status, there will be time enough for this Court to grant review, either in this case after the proceedings on remand or in another case holding that the issuance of a fee patent to a parcel of allotted land and the subsequent sale of the land to a non-Indian removed the land from reservation status notwithstanding 18 U.S.C. 1151(a).

sistent with *Ute Indian Tribe I*. After this Court decided *Hagen*, the district court, which considered itself bound to enforce the mandate in *Ute Indian Tribe I* as the law of the case, invited the Tenth Circuit to recall the mandate. See *Ute Indian Tribe II*, 114 F.3d at 1519- 1520.

The Tenth Circuit modified its mandate only with respect to the portion of *Ute Indian Tribe I* that was directly in conflict with *Hagen—i.e.*, the portion that concerned whether lands that had been restored to the public domain remained within the Reservation. *Ute Indian Tribe II*, 114 F.3d at 1528-1531. The court thus did not disturb its earlier holding in *Ute Indian Tribe I* with respect to other lands, including those that had been allotted to tribal members and that had since passed into fee status. *Id.* at 1529-1530. The court explained that, "[b]ecause of the importance of finality," *id.* at 1520, only those portions of *Ute Indian Tribe I* that were not in direct conflict with *Hagen* would be modified, *id.* at 1527.

The procedural posture of *Ute Indian Tribe II* makes it unlike other diminishment or disestablishment cases, as the Tenth Circuit itself recognized. See 114 F.3d at 1515-1516. This case does not arise in a similar procedural posture. Nor does this case present the same finality concerns as did *Ute Indian Tribe II*, which involved an en banc decision that had been the law in the Tenth Circuit for a decade by the time of *Hagen*. In contrast, the boundaries of the Yankton Sioux Reservation have been constantly in litigation since the Tribe commenced this action in 1994.

3. Finally, the Tribe contends (Pet. 18-19), as does the State (Pet. 26-29), that the court of appeals' decision has implications for other reservations in the western United States. We do not expect that to be so. As explained above, the court's decision purports to be simply an application of well-settled principles of law to the particular circumstances of this case. Cases involving other reservations will neces-

sarily involve different statutes opening the reservation to settlement, different treaties or agreements between the United States and the Tribe, different historical circumstances, different subsequent settlement activity, and different treatment of the opened lands by the United States, the State, and the Tribe. See *Solem*, 465 U.S. at 469 ("It is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted).

In any event, because the case was remanded to the district court for a determination of precisely which lands within the diminished Yankton Sioux Reservation are Indian country, the court of appeals' decision is interlocutory in nature. If the decision below proves, contrary to our expectations, to have the pernicious consequences that the Tribe or the State suggests, the Court will have a further opportunity to review that decision, together with any subsequent decision of the court of appeals after the proceedings on remand are completed.

## CONCLUSION

The petitions for a writ of certiorari should be denied.[10]

Respectfully submitted.

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[10] If the Court concludes, contrary to our submission, that review of the court of appeals' decision is warranted, we suggest that the Court grant both petitions, in order to ensure that it has before it the full range of issues going to both diminishment and disestablishment of the Reservation.