

No. 25-7600

In The
Supreme Court of the United States

HAZEN HUNTER WINCKLER,

Petitioner

v.

STATE OF SOUTH DAKOTA,

Respondent

**On Petition For A Writ Of Certiorari To
The Supreme Court Of South Dakota**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *McGirt* necessitate a reexamination of longstanding state and federal precedent holding that former Yankton Sioux Tribe reservation land upon which petitioner committed state criminal offenses is not Indian country when:

1. There is no split of authority concerning the non-Indian country status of the subject land; and
2. The non-Indian country status of this single parcel of land poses no compelling question of federal law.

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OPINION BELOW

The South Dakota Supreme Court’s decision in *State v. Winckler*, 33 N.W.3d 58 (S.D. 2026), is reproduced in the appendix to Winckler’s petition. APP. A-1.

STATEMENT OF THE CASE

In 1916, Charles Mix County in southeastern South Dakota built a courthouse and jail on formerly allotted Indian land within the former boundaries of the Yankton Sioux Tribe reservation. This courthouse, which still stands today, is the result and actualization of South Dakota’s assumption of complete jurisdiction over former Yankton Sioux Tribe reservation lands in 1895 following the enactment of the Surplus Land Act of 1894 (1894 Act). Act of August 15, 1894 (Surplus Land Act), Chapter 290, 28 Stat. 286 (1894); *State v. Greger*, 559 N.W.2d 854, 858 (S.D. 1997). It is within this courthouse and jail that the offenses of petitioner’s convictions occurred. Construction of this edifice of state governance would never have happened were it not understood by all concerned – Indian and non-Indian alike – that jurisdiction over Charles Mix County (with the exception of certain surviving Indian-owned allotments held in trust) had vested entirely in the State of South Dakota since the effective date of the 1894 Act. *Greger*, 559 N.W.2d at 859; *Bruguier v. Class*, 599 N.W.2d 364, 375 (S.D. 1999).

The South Dakota Supreme Court and the United States Court of Appeals for the 8th Circuit (8th Circuit) have long recognized that, to the extent it exists at all, the Yankton Sioux Tribe reservation has, as a consequence of the 1894 Act, diminished over time to little more than a “mile square” centered on the town of

Marty in Charles Mix County. *Greger*, 559 N.W.2d at 859; *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 606 F.3d 895, 897 (8th Cir. 2010)(describing the diminished reservation as scattered “allotted lands that remain in trust, additional lands taken into trust, and ceded lands reserved by the 1894 Act”).

Petitioner seeks to “remake [this] history” and restore the Yankton Sioux Tribe reservation to its 1894 boundaries (though no description of such boundaries exists). *DeCoteau v. District County Court*, 420 U.S. 425, 449 (1975). This Court’s decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020), is petitioner’s ploy to revisit and reverse the Yankton Sioux Tribe reservation’s disestablishment or diminishment from hundreds of thousands to tens of thousands of acres between 1894 and today. But *McGirt* does not dictate the same result in South Dakota as Oklahoma because of differences in the histories of the Yankton Sioux and Creek Indian tribal lands and the written instruments which determined their fates.

A. General Historical Context

After the establishment of the Yankton Sioux Tribe reservation in 1858, three successive and distinct eras of national Indian policy were visited upon these lands, generally to the detriment of a cohesive and lasting reservation for the Yankton Sioux Indian people. The ultimate effect of these policies is that, even if some remnant of a Yankton Sioux Tribe reservation survived the steady attrition of the land out of Indian hands, it does not embrace the subject allotment on which the Charles Mix County courthouse and jail stand today.¹

1. Treaty/Reservation Era 1858

Before the post-Civil War westward expansion, the nation's policy toward its native tribes was to relocate and settle them largely east of the Mississippi River on reservations where land was communally owned by each tribe and its members. *Greger*, 559 N.W.2d at 856; *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 998-999 (8th Cir. 2010). So long as the nation's attention was fixed on its affairs in the east, this out-of-sight/out-of-mind policy achieved a certain guarded coexistence simply through geographic separation of the Native- and Euro-American populations and cultures.

During this time, the United States treated with the Yankton Sioux Tribe to create a 430,495-acre reservation east of the Missouri River in present-day southeastern South Dakota. Treaty of April 19, 1858, 11 Stat. 743; *Greger*, 559 N.W.2d at 857. But with the end of the Civil War, the nation's attention and ambition became fixed upon its "manifest destiny" of continental expansion and consolidation incompatible with the existing geographic separation of Native Americans in the west and Euro-Americans in the east. With designs on Indian lands, Civil War veterans, pioneers, miners, railroads, and speculators in all manner of commercial interests of the time pressured Congress to open Indian

¹ There is a difference of opinion between the South Dakota Supreme Court and the 8th Circuit concerning whether the Yankton Sioux Tribe reservation was disestablished as a result of the 1894 Act or merely diminished. Compare *Bruguier v. Class*, 599 N.W.2d 364, 376 (S.D. 1999), with *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1005 n. 7 (8th Cir. 2010). The Court below made no finding with respect to disestablishment because the possible existence of a surviving reservation comprised of scattered trust allotments or tribally owned land has no bearing on the status of the parcel in question here. *State v. Winckler*, 33 N.W.2d 58, 72 at ¶¶ 30, 31, 82. Thus, it is not necessary to this case to resolve these discrepant views because under either court's holdings the subject parcel of land is not within Indian country.

lands to non-Indian settlement. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590 (1977) (“familiar forces” of “farmers, merchants, and railroad men” led “to demands to open up the reservation”). These demands begat a new national policy toward native lands. *Podhradsky*, 606 F.3d at 999.

2. Allotment Era 1887/1894

Westward expansion and a great wave of European migration to America in the late 19th Century created an irrepressible demand for Indian lands, giving rise to the allotment era. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). This era was inaugurated with the passage of the General Allotment Act of 1887 (1887 Act). Act of February 8, 1887 (General Allotment Act), Chapter 119, 24 Stat. 388, 389-390 (1887), 25 U.S.C. § 331. The 1887 Act generally ended the communal ownership of tribal lands by allotting 160-acre parcels of land “in severalty” to individual Indians to be held in trust for a period of 25 years. 1887 Act at § 1, 24 Stat. at 388; *Yankton Sioux Tribe*, 522 U.S. at 336. During the period of these trust patents, conveyance of any allotment to a non-Indian was generally prohibited. 1887 Act at § 5, 24 Stat. at 389; *Podhradsky*, 606 F.3d at 999.

But upon the expiration of these trust patents, the allotments were to be conveyed to their Indian owners in fee and restrictions on conveyance to non-Indians lifted. 1887 Act at § 5, 24 Stat. at 389; *Podhradsky*, 606 F.3d at. Simultaneously, allottees would “have the benefit of and be subject to the laws, both civil and criminal, of the state . . . in which they may reside.” 1887 Act at § 6, 24 Stat. at 389-390. The 1906 Burke Act reaffirmed the intention that these

allotments would pass from “the exclusive jurisdiction of the United States” upon expiration of the trust patents thereby subjecting “every allottee” to the “laws, both civil and criminal” of the state where he or she lived. Act of May 8, 1906 (Burke Act), Chapter 2348, 34 Stat. 182 (1906), 25 U.S.C. § 349.

The 1887 Act’s provisions “do not, alone, recite or . . . suggest that Congress intended thereby to terminate” a reservation opened for allotment. *Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Nor did the 1887 Act *require* the President “to open reservation land for allotment; he merely had the discretion to do so. In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation [in the form of surplus land acts] in order to assure that a particular reservation was in fact opened to allotment.” *Mattz*, 412 U.S. at 497. “[I]t is settled law that some surplus land Acts diminished reservations . . . and other surplus land Acts did not.” *Solem v. Bartlett*, 465 U.S. 463, 467 (1984); *Mattz*, 412 U.S. at 498 (special allotment legislation can be an “indication of congressional purpose to terminate a reservation”). Consequently, the effect of special legislation in disestablishing or diminishing reservation land is determined “on a reservation-by-reservation basis” depending on “the language of the Act and the circumstances underlying its passage.” *Solem*, 465 U.S. at 467; *McGirt*, 591 U.S. at 932 (“[e]ach tribe’s treaties must be considered on their own terms”).

Congress passed special legislation for the allotment of the Yankton Sioux Tribe lands in question here in the form of the 1894 Act. Act of August 15, 1894 (Surplus Land Act), 28 Stat. 286. This act allotted trust patents to all but

approximately 168,000 acres of the Yankton Sioux Tribe reservation to tribal members in accordance with the 1887 Act. *Greger*, 559 N.W.2d at 857. The balance or “surplus” of the unallotted lands were sold to the United States and opened to non-Indian settlement. Non-Indian settlers moved in, swiftly displacing and outnumbering the Native American population. *Greger*, 559 N.W.2d at 867.

“The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.” *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Podhradsky*, 606 F.3d at 999 (allotments “were intended to hasten the demise of the reservation system”). Though the allotment era’s “policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing,” when “all the lands had been allotted and the trust expired, the reservation could be abolished.” *Mattz*, 412 U.S. at 496.

At this aim the policy succeeded all too well. Allotment “proved a dreadful failure,” leading to the swift disestablishment or diminishment of Indian reservations across the country. *Bruguier*, 599 N.W.2d at 372. With Indian lands and culture at risk of vanishing altogether, the nation adopted a new policy which sought to arrest and, in some cases, reverse the steady erosion of Indian lands and culture and restore to tribes a measure of sovereignty, self-government and cultural identity. *Podhradsky*, 606 F.3d at 1001, 1016.

3. Reorganization Era 1934/1948

To that end, Congress dispensed with allotment and assimilation philosophies with the passage of the Indian Reorganization Act of 1934 (1934 Act), 25 U.S.C. §§ 450 *et seq.* Its purpose was to stop the “rapid erosion” of Indian lands through allotment and re-establish tribal government over surviving land holdings. *Podhradsky*, 606 F.3d at 1000. To achieve these goals, the 1934 Act terminated the further allotment of reservation lands, extended unexpired trust periods on allotted lands, and empowered the Secretary of the Interior to acquire lands to be placed into trust status and thus exempt from state and local taxation. 25 U.S.C. §§ 463, 465; *Podhradsky*, 606 F.3d at 1001. The 1934 Act also “permitted tribes to organize and adopt constitutions with a congressional sanction of self-government.” 25 U.S.C. §§ 476. Although the passage of the 1934 Act stemmed the further erosion of tribal lands, it did not reverse the loss of reservation land that had already occurred. *Podhradsky*, 606 F.3d at 1017.

B. Case Procedural History

Hazen Hunter Winckler was charged with two separate public offenses – simple assault on a fellow inmate of the Charles Mix County jail and failure to appear at the Charles Mix County courthouse for a pretrial conference in connection with the prosecution of that offense. Both of these offenses occurred on former allotment land that, as described in Winckler’s petition, had been conveyed upon the death of the original allottee to the Lake Andes town corporation for the purposes of constructing a courthouse and jail. Winckler was convicted of both

offenses and has challenged the state court's jurisdiction over him on the ground that the land on which the offenses occurred is Indian country. The South Dakota Supreme Court rejected Winckler's jurisdictional argument and affirmed his convictions. *Winckler*, 2026 S.D. 19 at ¶¶ 45, 75, APP. at A-1. Winckler petitions this Court for review of the South Dakota Supreme Court's decision.

REASONS FOR DENYING THE PETITION

This Court has recognized that the 1894 Act diminished the Yankton Sioux Tribe reservation at a minimum to the extent of the surplus lands opened for settlement. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998). Here, Winckler questions the 1894 Act's effect on the parcel of allotted land where the subject offenses occurred, largely by retrospectively applying more enlightened reorganization era precepts to allotment era events. But the factual and historical record of the Yankton Sioux Tribe reservation's formation and eventual evaporation reveal that, consistent with this Court's allotment era authorities and *Yankton Sioux Tribe* decision, the 1894 Act contemplated the Yankton Sioux Tribe reservation's further diminishment through the extinguishment of Indian title whenever allotted lands passed from Indian to non-Indian hands. *Corps of Engineers*, 606 F.3d at 897.

This Court's *Yankton Sioux Tribe* decision, the laws in effect during the allotment era, and even present-day 18 U.S.C. § 1151(c) defeat petitioner's central premise that the subject allotment is in Indian country. Certiorari should not be granted to address a question that presents no actual dispute of federal law.

Petitioner’s secondary premise – that some vestige of the Yankton Sioux Tribe reservation still exists – was not considered necessary to the determination of the Indian country status of the subject allotment by Court below. Certiorari should not be granted to resolve a question not addressed by the Court below or necessary to the disposition of this petition.

A. Effect Of Conveyance Of Indian Allotments To Non-Indians In The Allotment Era

This Court’s allotment era authorities reflect that the conveyance of allotments in fee title to non-Indians terminated its trust status and severed its connection to the reservation. *Montana v. United States*, 450 U.S. 544, 559 n. 9 (1981)(“throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction”).

In *Clairmont v. United States*, 225 U.S. 551, 553 (1912), an Indian man was convicted of introducing intoxicating liquor onto the Flathead Indian Reservation by carrying a pint bottle of whiskey on his person while a passenger on a train traveling on right-of-way granted to the railway by an act of Congress. He appealed his conviction on the ground that, because the right-of-way was no longer reservation land by reason of its sale to the railroad, he could not have introduced alcohol “onto the reservation” until he stepped out of the right-of-way onto adjacent reservation land, which he never did during the timespan in question. *Clairmont*, 225 U.S. at 553. The liquor statute defined Indian country to include “any Indian allotment, while the title to the same shall be held in trust by the government, or . .

. inalienable by the allottee without the consent of the United States.” *Clairmont*, 225 U.S. at 554.

The *Clairmont* court noted that the liquor statute’s definition of Indian country matched the then-prevailing, general definition of Indian country as “all the lands” west of the Mississippi River previously assigned to the Indians to which “Indian title had not been extinguished.” *Clairmont*, 225 U.S. at 558; *Bruguier*, 599 N.W.2d at 372, citing Act of June 30, 1834, Pub. L. No. 23-161, 4 Stat. 729 (1834). *Clairmont* stated that this definition, though overtaken in some respects by the precipitous diminishment of Indian lands west of the Mississippi, could “still ‘be referred to in connection with the provision of its original context, which remain in force, and may be considered in connection with the changes which have taken place . . . with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes.’” *Clairmont*, 225 U.S. at 557.

From this definition, *Clairmont* extrapolated a “simple criterion . . . that as to all the lands” west of the Mississippi previously assigned to the Indian people, such lands were:

Indian country whenever Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

Clairmont, 225 U.S. at 558.

On its face, the liquor statute reflected a then-prevailing understanding that “Indian title” in respect to an “Indian allotment” referred not to communal or tribal title, but *individual* title which was “held in trust by the government” or was “inalienable *by the allottee* without the consent of the United States.” *Clairmont*, 225 U.S. at 558 (emphasis added). Thus, the allotment’s connection to tribal sovereignty or a surrounding reservation became extinguished upon the *allottee’s* conveyance of the land to a non-Indian and so ceased to be Indian country. *Clairmont*, 225 U.S. at 558. “[P]ut another way, tribal title ended when tribal ownership ended.” *Bruguier*, 599 N.W.2d at 373, citing *Solem*, 465 U.S. at 468 (tribal ownership coextensive with Indian ownership in the allotment era).

Again, in *United States v. Pelican*, 232 U.S. 442, 446 (1914), the court ruled that an Indian allotment within a portion of former Indian reservation land which was still held in trust remained Indian country despite lying outside the boundaries of the diminished Colville Indian reservation. On this trust patent allotment, otherwise surrounded by land held in the public domain, the United States retained its jurisdiction over crimes against Indian people “until the issuance of [a] fee-simple patent” to the allottee. *Pelican*, 232 U.S. at 451. *Pelican* noted that “the expiration of the trust period” would result in “the subjection of allottees under th[e] 1887 Allotment Act to state laws” per the section of that act that provided that, upon the termination of the trust and issuance of a fee patent, “every allottee should ‘have the benefit of and be subject to the laws, both civil and criminal, of the state . . . in which they may reside.’” *Pelican*, 232 U.S. at 450, 451.

And in *United States v. Nice*, 241 U.S. 591, 595 (1916), a non-Indian was convicted of selling liquor to a Sioux tribal member in Indian country on allotted land “the United States was still holding in trust” for his benefit. As with contemporaneous Yankton Sioux Tribe allotments, this allotment was held in trust for 25 years from the date of allotment. “At the end of th[is] period, the [United States] would convey the [allotment] to him . . . in fee, discharged of the trust,” at which time the “allottee [w]ould be entitled to all the rights and privileges and be subject to all of the provisions’ of § 6 of the general allotment act of February 8, 1887.” *Nice*, 241 U.S. at 596. At the time of the subject liquor sale, the *Nice* court “recognized [that as to the Indian buyer this trust status] was still continuing, and nothing is found elsewhere indicating that it was to terminate short of the expiration of the trust period.” *Nice*, 241 U.S. at 596. But, “upon the completion of the allotments and the patenting of the lands, the allottees should have ‘the benefit of and be subject to the laws, both civil and criminal, of the state or territory’ of their residence.” *Nice*, 241 U.S. at 596. So, while the tribal relation was “ultimately to be broken up, [it] was not to be dissolved by the making or taking of allotments” and would be “recognized during the trust period as still continuing.” *Nice*, 241 U.S. at 596-597.

Thus, “[t]he ultimate question” in the *Nice* court’s judgment was “whether § 6 of the act of 1887 – the section as originally enacted – was intended to dissolve the tribal relation and terminate the national guardianship upon the making of the allotments and the issue of the trust patents, without waiting for the expiration of

the trust period.” *Nice*, 241 U.S. at 599. The *Nice* court concluded that, while it was “certain that the dissolution of the tribal relation was in contemplation,” it “was not to occur when the allotments were completed and the trust patents issued.” *Nice*, 241 U.S. at 599. But though an allotment’s tribal connection was not “presently terminated” by the issuance of a trust patent, this held true only “during the trust period.” *Nice*, 241 U.S. at 600. At the end of the trust period, when the final fee patent was issued, allottees became subject to all privileges and duties of state law not inconsistent with federal law. *Nice*, 241 U.S. at 600. As *Clairmont* had found four years earlier, extinguishing the tribal connection to allotted land by conveying fee title to a non-Indian was not inconsistent with or outside the contemplation of federal law at that time. *Nice*, 241 U.S. at 599; *Clairmont*, 225 U.S. at 558.

Together, *Clairmont*, *Pelican* and *Nice* reflect the allotment era understanding that termination of reservation status of allotted lands, and assumption of the rights and obligations of the state’s civil and criminal laws, coincided with the expiration of the trust period and sale of former trust lands to non-Indians. Indeed, *Nice* expressly rejected efforts by states to subject allottees to state law earlier – upon the issuance of their allotment and trust patent – rather than at the expiration of the trust and issuance of a fee patent. *Nice*, 241 U.S. at 601, overruling *In re Heff*, 197 U.S. 488 (1905); *United States v. Rickert*, 188 U.S. 432 (1903)(rejecting state taxation of allotted lands and improvements upon such “until the [Indian] title has been extinguished by the United States”); *Bates v. Clark*, 95 U.S. 204 (1877)(“Indian title in common, or put another way, tribal title,

ended when tribal ownership ended”). Under the laws in effect in 1904, conveyance of the subject allotment to the Lake Andes township extinguished any connection of the allotment to reservation or Indian country lands.

B. This Court’s 1998 *Yankton Sioux Tribe* Decision

The question before this Court in *Yankton Sioux Tribe* was whether the 1894 Act “diminished the boundaries” of the Yankton Sioux Tribe reservation with respect to the unallotted land explicitly ceded by that act. *Yankton Sioux Tribe*, 522 U.S. at 333. Though *Yankton Sioux Tribe* did not directly address the status of non-ceded, allotted lands such as the subject allotment, the Court found the 1894 Act distinguishable from other surplus land acts that it “ha[d] interpreted as maintaining reservation boundaries.” *Yankton Sioux Tribe*, 522 U.S. at 345.

In contrast to surplus land acts that had “simply offered non-Indians the opportunity to purchase land within the established reservation boundaries,” *Yankton Sioux Tribe* noted the 1894 Act’s intent to “break down the barriers” of the “outside boundary” of the reservation thereby “opening” the “reservation” to settlement without distinguishing unallotted land presently ceded from allotments which in time could be conveyed to non-Indians. *Yankton Sioux Tribe*, 522 U.S. at 353. In a letter to Congress, tribal leaders urged quick action on the 1894 Act, saying they “want[ed] the laws of the United States and the State that we live in to be recognized and observed. We do not think it is a proper thing to keep up the tribal relation – as the tribal relation on this reservation is an obstacle and hindrance to the advancement of civilization.” *Yankton Sioux Tribe*, 522 U.S. at

353. Thus, this Court found that the “cession of the surplus lands dissolved tribal governance” over not just the area of those lands “but of the 1858 reservation” as a whole with the aim of rendering “their tribal interest and estate . . . a thing of the past.” *Yankton Sioux Tribe*, 522 U.S. at 353; Report of the Yankton Indian Commission, S. Exec. Doc. No. 27, 53d Cong., 2d Sess., 2, 7, 12 (1894)(using “cession” to describe sale of unallotted lands).

Thus, unlike acts which simply permitted non-Indians to purchase and live on reservation land, *Yankton Sioux Tribe* found that the 1894 Act signified an intent to alter “the reservation’s character” and work “a reconception of the reservation” by dissolving the 1858 reservation boundaries and tribal governance over the entirety of the former reservation. *Yankton Sioux Tribe*, 522 U.S. at 343, 352; *Pelican*, 232 U.S. at 449 (allotted lands retain “Indian character” “during the trust period”). Importantly to petitioner’s contentions here, *Yankton Sioux Tribe* found that the savings clause of Article XVIII of the act “pertain[ed] to the continuance of annuities, *not the 1858 borders*.” *Yankton Sioux Tribe*, 522 U.S. at 800 (emphasis added), citing *Greger*, 559 N.W.2d at 347.

C. Current Status of Allotted Lands

Both the South Dakota Supreme Court and the 8th Circuit have on several occasions examined the effects of the 1894 Act and *Yankton Sioux Tribe* decision on allotted lands. After an exhaustive examination of factors prescribed by this Court in *Solem*, the South Dakota Supreme Court found in *Greger* and again in *Brugwier* that the Yankton Sioux Tribe reservation was immediately diminished by the 1894

Act to the extent of the surplus lands, and thereafter incrementally diminished (possibly disestablished) by successive conveyances of allotted land to non-Indians. *Greger*, 559 N.W.2d at 867; *Bruguier*, 599 N.W.2d at 378; *Wood v. Jameson*, 130 N.W.2d 95, 99 (S.D. 1964). Likewise, the 8th Circuit found that the Yankton Sioux Tribe reservation was immediately diminished to the extent of the tribe's cession of its unallotted lands and "was further diminished when allotted lands passed out of Indian ownership." *Corps of Engineers*, 606 F.3d at 897; *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (8th Cir. 1999); *Podhradsky*, 606 F.3d at 1016-1017.

The detailed examinations of the *Solem* factors conducted by both the South Dakota Supreme Court and the 8th Circuit lead inexorably to the conclusion that the 1894 Act "diminish[ed] the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of white settlers and homesteaders," which includes the subject allotment. *Gaffey*, 188 F.3d at 1018-1031; *Greger*, 559 N.W.2d at 856-867. A reexamination of those factors here supports the same conclusion.

1. Statutory Language

"Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Solem*, 465 U.S. at 470. "Explicit reference to cession [in a statute enacted to open Indian lands] or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470.

But “explicit language of cession and unconditional compensation are not prerequisites” for a finding of diminishment. *Solem*, 465 U.S. at 471.

In examining the statutory language of the 1894 Act, the South Dakota Supreme Court acknowledged that one “would search [the act] in vain for words like ‘diminishment’ or ‘disestablishment’ as such expressions were not terms of art at the time.” *Greger*, 559 N.W.2d at 861. So *Greger* looked “for other statutory language evincing an ‘express congressional purpose to diminish,’” recognizing that “no particular form of words is required.” *Greger*, 559 N.W.2d at 861; *Mattz*, 412 U.S. at 505 (a “congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history”). Clear statutory intent to change the boundaries of the Yankton Sioux Tribe reservation is readily found in the 1894 Act, as is “other language” evidencing the surrender of tribal interests over the entire 1858 reservation. *Solem*, 465 U.S. at 470.

Congress enacted a two-stage process for diminishing, if not disestablishing, the Yankton Sioux Reservation. First, in Articles I and II of the 1894 Act, Congress immediately diminished the reservation to the extent of the unallotted lands by declaring them ceded, sold for a sum certain of \$600,000, relinquished, and conveyed to the United States. Such terms are “precisely suited” to and “hallmarks of Congressional intent to diminish a reservation.” *DeCoteau*, 420 U.S. at 445; *Yankton Sioux Tribe*, 522 U.S. at 345. Thus, the 1894 Act “was both a divestiture of the [Yankton Sioux] Tribe's ownership of the ceded lands and a diminution of the

boundaries of the reservation.” *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 768 (1985).

Second, Congress placed the remainder of the reservation on the path of further diminishment through allotment, which terminated the communal, sovereign title to reservation lands through conveyance of fee patents to individual allottees “in severalty.” *Nice*, 241 U.S. at 599; *Clairmont*, 225 U.S. at 558; *Corps of Engineers*, 606 F.3d at 897. Congress passed surplus land acts “to facilitate the process” of dissolving reservations. *Solem*, 465 U.S. at 468. In the allotment era, Congress “consistently equated” allotment “with the dissolution of tribal affairs and jurisdiction.” *Montana*, 450 U.S. at 559 n. 9. “The [reorganization era] notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have been . . . quite foreign” to Congress in 1894. *Gaffey*, 188 F.3d at 1022. Thus, as observed by this Court in respect to the Yankton Sioux Reservation, the “critical [allotment era] component of reservation status” – communal tribal ownership – ceased upon conveyance of land to individual allottees. *Yankton Sioux Tribe*, 522 U.S. at 346. Thus, without “any further act of Congress,” any connection of these allotments to reservation land ended no later than the issuance of fee patents to Indian owners, and any connection to Indian country ended upon their subsequent conveyance to non-Indian ownership. *Nice*, 241 U.S. at 599; *Clairmont*, 225 U.S. at 558.

These statutory provisions contrast sharply with those before this Court in *McGirt*. Unlike the Yankton Sioux Tribe, “the Creek Nation received assurances

that their new lands . . . would be secure forever” in exchange for their ceded lands. *McGirt*, 591 U.S. at 897. Far from being “secure forever,” Yankton Sioux Tribe allotted lands were only secure for the 25 years of their trust period (later reduced by the Burke Act), at which time the allotments would pass from “the exclusive jurisdiction of the United States” in trust patent to individual allottees in fee patent and then potentially to non-Indians. Burke Act, Chapter 2348, 34 Stat. 182 (1906), 25 U.S.C. § 349; *Pelican*, 232 U.S. at 450, 451.

Unlike the 1894 Act, both parties to the Creek Nation treaty “settled on boundary lines for a new and ‘permanent home to the whole Creek nation.’” *McGirt*, 591 U.S. at 897, 900. By contrast, the 1894 Act dissolved the extant exterior boundaries of the Yankton Sioux Tribe reservation established in 1858 but did not establish any new boundary. *Gaffey*, 188 F.3d at 1028 (1894 Act did not “define new reservation boundaries”). The 1894 Act did nothing to “create a [new, diminished] reservation” by describing “a certain defined tract” held in reserve for the benefit of the tribe. *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902). Instead, thereafter the Yankton Sioux Indian country, in keeping with the then-prevailing definition, consisted only of scattered allotments to which “Indian title had not been extinguished.” *Clairmont*, 225 U.S. at 558. These surviving allotments remained Indian country so long as they were Indian-owned but were not Indian reservation. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-529 (1998).

The Creek Nation treaty in *McGirt* promised the tribe “unrestricted right to self-government” on lands that would not “ever be embraced or included within . . .

any . . . state.” *McGirt*, 591 U.S. at 897, 902. But the 1894 Act made no such provision for the Yankton Sioux Tribe to “govern themselves,” to reserve land for tribal purposes, or to be “forever set apart” from any state. *McGirt*, 591 U.S. at 897, 902; *Bruguier*, 599 N.W.2d at 373. In *Yankton Sioux Tribe*, this Court was “not persuaded” that the 1894 Act reflected “an agreement to maintain exclusive tribal governance within the original reservation boundaries.” *Yankton Sioux Tribe*, 522 U.S. at 348. Instead, the State of South Dakota assumed governing jurisdiction of the entire area of the former 1858 reservation in 1895 and, upon the expiration of Indian-held trust patents, Indian allottees became subject to the “laws, both civil and criminal” of the state. Burke Act, Chapter 2348, 34 Stat. 182 (1906), 25 U.S.C. § 349; *Pelican*, 232 U.S. at 450, 451; *Greger*, 559 N.W.2d at 858.

Thus, the statutory language of the 1894 Act evinces no purpose to retain any of the 1858 lands as Indian reserve, nor even as Indian country except for “allotted lands that remain[ed] in trust, additional lands taken into trust, and ceded lands reserved by the 1894 Act.” *Corps of Engineers*, 606 F.3d at 897. The contemporaneous circumstances surrounding the 1894 Act’s origins and legislative history also support the conclusion that the Yankton Sioux Tribe reservation’s boundaries were abolished and set upon a course of further diminishment. *Mattz*, 412 U.S. at 505.

2. Contemporaneous Understandings

If the two-stage diminishment of the reservation set in motion by the 1894 Act – immediate diminishment through cession of unallotted lands and continual

diminishment of the remainder through allotment – leaves any question about its intentions, “unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished.” *Yankton Sioux Tribe*, 522 U.S. at 351. While *McGirt* eschewed extratextual evidence in that case, it was because the textual evidence of intent was sufficiently clear that it felt no need to consult extratextual sources. *McGirt*, 591 U.S. at 916. *McGirt* did not, as petitioner suggests, prohibit consideration of contemporaneous historical evidence of intent or mutual understandings identified as relevant in *Solem*; but, if it did, *McGirt* should be clarified or overruled to restore the second and third *Solem* factors to the analysis. Here, the contemporaneous evidence confirms that Congress’ intent behind the allotment component of the 1894 Act was, at a minimum, to drastically diminish (if not disestablish) the Yankton Sioux Tribe reservation.

i. Mission Statement

As soon as 1887 Act-allotment was implemented in 1891, the Secretary of the Interior formed the Yankton Indian Commission for the purpose of purchasing remaining, unallotted land specifically and “negotiating . . . for the surrender of portions of their respective reservations” generally. *Greger*, 559 N.W.2d at 857. Although the immediate objective of the negotiations was the purchase of the unallotted lands, the Commissioners viewed the purchase as a step in the larger process of integrating Indian tribes into society at large. The Commission discovered that:

Careful inquiry into the conditions and requirements of th[e Yankton Sioux] Indians soon revealed to [the Commission] the fact that the purchase of the surplus land was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands.

S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 17; *Gaffey*, 188 F.3d at 1018.

With the unceasing wave of settlers into the west following the Civil War, and the consequent annihilation of the buffalo and game upon which the Indian people relied for sustenance, the Yankton Sioux Indians were “badly off” and “in need of help.” *Greger*, 559 N.W.2d at 857-858; S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 18, 49, 54, 74 (finding Indian people “not sufficiently housed, sufficiently clothed, or sufficiently fed” and that they “suffer and even die for want of better care”); *DeCoteau*, 420 U.S. at 431 (noting that South Dakota Indian tribes were “suffering from disease and bad harvests” in 1891). Given these “conditions,” Commissioners believed the tribe required more comprehensive action for their “future welfare” than just the sale of their surplus lands. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 11, 17; *Gaffey*, 188 F.3d at 1018. Co-habitation with non-Indians was considered integral to improving the Indian condition; Commissioners expected non-Indians to be good examples of farming methods to Indians and expected that the non-Indians’ cultivation and improvement of their allotments would improve the value of neighboring Indian allotments for the general benefit of the Indian population. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 13, 14, 18, 49, 50. Significantly, with the expected influx of non-Indian settlers onto “scattered”

allotments that were “mixed up with the allotted lands of the Indians,” Commissioners concluded the area would “need a court system of larger jurisdiction” as “courts established by and for the Indians w[ould] no longer answer th[e] demands” of a mixed population. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 13, 15, 19. Thus, the Commission anticipated that “the Yankton Indians” would become subject to and “have the same rights in the courts of the State” as non-Indians. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 19. Thus, “the Commission[’s] report [contained] evidence that the 1894 Act involved alteration of ‘the reservation’s character’ and ‘a reconception of the reservation’” in order to bring the Indian population under state jurisdiction and hasten the tribe’s transition to a self-sufficient lifestyle “devote[d] . . . to systematic farming.” *Greger*, 559 N.W.2d at 857; *Gaffey*, 188 F.3d at 1021, quoting *Yankton Sioux Tribe*, 522 U.S. at 798, 802; S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 14, 24.

ii. Negotiations

At the time of the 1894 Act negotiations, the allotment process was not complete, with many allotments yet to be finalized, a fact which certainly contributed to the dire conditions observed by the Commission and a point of contention by the Tribe. Thus, the 1894 Act incorporated Articles V and XIV, which facilitated and expedited the allotment process, guaranteeing that allotments would “be confirmed as speedily as possible.” 1894 Act at Article V, § 2, Article XIV, APP. B-2; *Gaffey*, 188 F.3d at 1028.

During the negotiations, Commissioner J. C. Adams informed the Tribe that once surplus lands were sold, the Tribe would “assist in making the laws which will govern [members of the Tribe] as citizens of the State and nation.” *Yankton Sioux Tribe*, 522 U.S. at 353; S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 48. Yankton Sioux tribal leaders understood the consequences of such statements. In a letter to Congress, tribal leaders stated they were prepared to live under “the laws of the United States and the State that we live in” and that “keep[ing] up the tribal relation” had become “an obstacle and hindrance” to their wellbeing. *Greger*, 559 N.W.2d at 857; *Yankton Sioux Tribe*, 522 U.S. at 353. To that end, the 1894 Act provided that allottees would assume “all the duties and responsibilities of citizenship” once “complete title to their allotted lands” was received. 1894 Act at Article V, § 2.

Commissioner Browning reported reaching an agreement by which the land would be “restored to the public domain.” *Greger*, 559 N.W.2d at 865. “The Tribe retained no land for itself as a seat of government from which to manage the domain [petitioner] now claims to be under its jurisdiction” and “the Tribe’s 1932 Constitution assert[ed] no claim to the 1858 Treaty boundaries.” *Greger*, 559 N.W.2d at 866.

As this Court found, “the record of the negotiations between the Commissioners and Yankton Sioux tribal representatives contains no discussion of the preservation of the 1858 boundaries.” *Yankton Sioux Tribe*, 522 U.S. at 347. Rather, the Commissioners reported that “now that [members of the Tribe] have

been allotted their lands in severalty 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.” *Yankton Sioux Tribe*, 522 U.S. at 353; S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 16.

iii. Legislative Debate

While having only modest weight in the *Solem* analysis, Congressional debate on the 1894 Act reflects an understanding that the lands involved “would become part of the public domain.” *Yankton Sioux Tribe*, 522 U.S. at 353; *Greger*, 559 N.W.2d at 866; *DeCoteau*, 420 U.S. at 446 (statements by sponsors of legislation to acquire unallotted lands of Lake Traverse reservation that “agreements [with tribe] would return the ceded lands to the ‘public domain’” indicative of Congressional intent to terminate reservation). Likewise, the Commissioner of Indian Affairs voiced the understanding that the 1894 Act lands would “be restored to the public domain.” *Greger*, 559 N.W.2d at 866. Generally, “public domain” language – which certainly referred in the most immediate sense to the unallotted lands but which could also contemplate the eventual fee patent ownership of allotted lands – “indicates Congressional intent to diminish a reservation.” *Yankton Sioux Tribe*, 522 U.S. at 353, citing *Solem*, 465 U.S. at 475. The history of the former Yankton Sioux Tribe reservation lands subsequent to the 1894 Act unfolded in precise unison with the apparent Congressional intent to diminish, if not disestablish, the reservation.

3. Subsequent Developments

“Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, [this Court has] acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.” *Yankton Sioux Tribe*, 522 U.S. at 356. The Yankton Sioux Tribe unallotted lands were declared available for non-Indian settlement in May of 1895 and, predictably, settlers and homesteaders flooded in. *Greger*, 559 N.W.2d at 858.

Simultaneously, the State of South Dakota assumed civil and criminal jurisdiction over the entire region, which it has maintained continuously to this day. *Greger*, 559 N.W.2d at 858. “[A]fter the 1895 opening [of the former reservation lands] no one *behaved* as if the reservation remained in existence, not the Federal Government, not the Yankton Sioux, not the homesteaders, not the townspeople.” *Bruguier*, 599 N.W.2d at 375. “Since 1895 . . . South Dakota courts have consistently maintained, without intervention by federal or tribal authorities, civil and criminal jurisdiction within the former reservation boundaries.” *Greger*, 559 N.W.2d at 866; *Rosebud Sioux Tribe*, 430 U.S. at 603 (“the single most salient fact [concerning the parties’ understanding of jurisdiction] is the unquestioned actual assumption of state jurisdiction” over the land). Thus, by 1997, “[a]ll criminal offenses on non-trust land (91% of the region) [we]re handled in state courts.” *Greger*, 559 N.W.2d at 866. “[T]he fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the

State's exercise of authority, is a factor entitled to weight as part of the 'jurisdictional history.'" *Rosebud Sioux Tribe*, 430 U.S. at 604.

The Department of Interior's 1889 map of the region showed the Yankton Sioux Tribe reservation as formed in 1858, but by 1901 the reservation had disappeared from the maps. *Greger*, 559 N.W.2d at 865. Annual Reports of the Commissioner of Indian Affairs before the 1894 Act described a reservation of "409.75 square miles" but by 1896 and 1897 the Commissioner made no report of any surface area attributed to a Yankton Sioux Tribe reservation. *Greger*, 559 N.W.2d at 865.

With the deluge of settlers and homesteaders into the region, "the population of Charles Mix County increased 103.4 percent between 1890 and 1900, and of the 8,498 people residing in Charles Mix County in 1900, only 1,483 were Indian." *Greger*, 559 N.W.2d at 867. By 1930, the Indian population had divested itself of 387,047 acres, leaving only 43,358 acres in Indian hands. *Greger*, 559 N.W.2d at 867. The 1932 Yankton Sioux Tribe Constitution, amended in 1962, defined the Tribe's territory to include only "6,000 acres of tribal land." *Yankton Sioux Tribe*, 522 U.S. at 357. As of 1998, "the total of Indian holdings in the region consist[ed] of approximately 30,000 acres of allotted land and 6,000 acres of tribal land." *Yankton Sioux Tribe*, 522 U.S. at 339, 356. At the time of *Yankton Sioux Tribe*, "[f]ewer than 10 percent of the 1858 reservation lands [we]re in Indian hands," with "non-Indians constituting over two-thirds of the population within the 1858 boundaries, and several municipalities inside those boundaries hav[ing] been incorporated under

South Dakota law.” *Yankton Sioux Tribe*, 522 U.S. at 356; *Greger*, 559 N.W.2d at 867 (less than 10 percent of the land within the 1858 Treaty boundaries was trust land); *Hagen v. Utah*, 510 U.S. 399, 420-421 (1994)(when “population of the area [wa]s approximately 85% non-Indian” and “only a few surviving pockets of Indian allotments” remained, subsequent development of former reservation consistent with intent to dissolve).

At the time of the *Greger* decision, over 600 miles of road in the area were maintained by county and state township authorities, whereas only 22 miles were maintained by the Bureau of Indian Affairs. The state-chartered municipalities of Wagner, Lake Andes, Dante, Pickstown, Ravinia and Marty all lie within the former 1858 Treaty boundaries. “[T]he area remains ‘predominantly populated by non-Indians with only a few surviving pockets of Indian allotments.’” *Yankton Sioux Tribe*, 522 U.S. at 356. This Court found that “th[e]se demographics signify a diminished [Yankton Sioux Tribe] reservation.” *Yankton Sioux Tribe*, 522 U.S. at 356.

The fact that the Tribe did not subsequently act on the Commission’s suggestion during the negotiations that it “might . . . after you sold your lands . . . [seek to] have this reservation organized as a separate county” in which it could “govern [its] own people in [its] own way” reflects a contemporaneous understanding that, without further action, the reservation would cease to exist upon enactment of the 1894 Act, at which time the Tribe would become subject to state jurisdiction. S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 48; *Gaffey*, 188 F.3d at 1024; *DeCoteau*,

420 U.S. at 447 (though tribe “would have been better advised to have carved out a diminished reservation, instead of or in addition to retained allotments” this Court “cannot rewrite” agreements and “reinstate the entire reservation”).

4. *Solem* Factors Conclusion

The text of the 1894 Act, the parties’ contemporaneous understandings, and the subsequent development of the land under state jurisdiction clearly establish an intent to diminish the Yankton Sioux Tribe reservation of 1858 by cession of unallotted land and by allotments which divested the tribe of a communal reservation once conveyed “in severalty” to individual allottees. “When viewed in its full historical context . . . it is clear that the parties [to the 1894 Act] did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non-Indian hands.” *Gaffey*, 188 F.3d at 1030. Thus, the subject allotment on which the Charles Mix County courthouse and jail currently stand lost any connection to either reservation or Indian country as those terms were understood in the allotment era when it was transferred to non-Indian ownership in 1904.

D. An Inapt Vehicle

This case is an inapt vehicle for either of petitioner’s professed objectives – a finding that the subject parcel is Indian country or that a Yankton Sioux Tribe reservation still exists in some form. There is no “split,” there is no compelling federal question, there is no plausible historical or legal basis for Winckler’s

revisionist assertions. As a vehicle for getting petitioner to either of his stated destinations, this case is a lemon.

1. 18 U.S.C. § 1151

The central enactment of reorganization era objectives is 18 U.S.C. § 1151, which was not passed until 1948. For the first time “Indian ownership and tribal ownership were legally distinguished in identifying Indian country.” *Bruguier*, 599 N.W.2d at 373; *Podhradsky*, 606 F.3d at 1007, 1010, 1017. 1151 recognized three categories of remaining Indian land: extant reservations (1151(a)), dependent communities formed out of former trust lands transferred to tribal ownership (1151(b)), and scattered Indian-held allotments and lands that generally were remnants of former reservations (1151(c)).

1151(a) codified the 1934 Act’s aims of stemming the erosion of Indian land and culture by shoring up existing reservations. To that end, 1151(a) declared “all land within the limits of any Indian reservation” to be Indian country “notwithstanding the issuance of any patent.” But by the time of 1151(a)’s enactment, the Yankton Sioux Tribe reservation had, for all intents and purposes, ceased to exist and approximately 90% of its allotted lands had passed out of Indian ownership. *Greger*, 559 N.W.2d at 867. There were no “limits of any [Yankton Sioux Tribe] Indian reservation” or “block of land . . . set aside” to which 1151(a)’s proscription on further alienating Indian title within, or eroding the outer limits of, reservation boundaries might apply. *Bruguier*, 599 N.W.2d at 373; *Solem*, 465 U.S.

at 470; *Podhradsky*, 606 F.3d at 1007, 1010, 1017 (applying 1151(a) prospectively to “all outstanding allotments”).

With respect to 1151(b), this category “refers to a limited category of Indian lands that are neither reservations nor allotments.” *Venetie*, 522 U.S. at 527. The subject land is a former allotment so, for this reason alone, 1151(b) does not apply. Nor could the subject allotment or the town of Lake Andes meet the “set aside” and “federal superintendence” criteria of 1151(b). Neither the tribe nor the federal government exercised any governing authority over the town of Lake Andes after the effective date of the 1894 Act and have not to this day. The town of Lake Andes maintains roads within the community, Charles Mix Country provides law enforcement services to the town, the Lake Andes School District provides educational services for all children in the community, Indian and non-Indian, and the Lake Andes Fire Department provides fire protection services. SETTLED RECORD, *State v. Winckler*, No. 31007 at 314 (Exhibits D, E, F, G). While the Yankton Sioux Tribal Police maintain an office in Lake Andes, it is simply to police the remaining parcels of Indian trust and tribe-owned lands described in *Corps of Engineers*, 606 F.3d at 897. And as the *Winckler* court found, federal services targeted to the needs of the subset of Yankton Sioux Tribe members within the larger population of Lake Andes and Charles Mix County “are not indicia of active federal control . . . sufficient to support a finding that” any part of the former reservation was a “dependent Indian communit[y]” within the meaning of 1151(b). *Winckler*, 33 N.W.3d at 73-75, ¶ 42.

1151(c) is specifically addressed to allotments and other Indian lands that once existed within the boundaries of reservations, such as the subject allotment. *Venetie*, 522 U.S. at 527. 1151(c) recognizes the historical reality that some reservations had been dissolved during the allotment era and could not be legislated back into existence. Unlike 1151(a), 1151(c) contains no proscription against further alienation of allotted Indian lands. In 1948, all that arguably remained of the 1858 reservation were scattered “Indian allotments, the Indian titles to which ha[d] not been extinguished.” 1151(c)’s limited aim was to retain these allotments within Indian country so long as they remained Indian-owned. But the subject allotment on which the Charles Mix County courthouse and jail sit had been conveyed to non-Indian ownership 44 years before 1151’s enactment. Under the law at that time, as well as under 1151(c), this conveyance extinguished any connection of the allotment to reservation land or Indian country. *Podhradsky*, 606 F.3d at 1007-1008. Petitioner’s ahistorical contention that the subject allotment is Indian Country under 1151(a) or (b) is not a compelling federal question requiring this Court’s attention.

2. “Impermissible” Checkerboarding

Petitioner protests that “making Indian country contingent on private ownership history” will result in “impermissible” checkerboarding. First, Congress itself made “ownership history” the *sine qua non* of Indian country back in 1834 and again in 1948 with respect to 1151(c) allotments outside the limits of any Indian reservation whose Indian title had extinguished. 18 U.S.C. § 1151(c). Second,

checkerboarding, while disfavored, is not “impermissible,” nor did it even become disfavored until 1948, long after the conveyance of the allotment in question.

Checkerboarding was by no means disfavored in 1894. At the time of the 1894 Act, “the [Yankton Sioux Tribe] surplus lands [we]re not in one body but scattered over the reservation and mixed up with the allotted lands of the Indians.” S. Exec. Doc. No. 27, 53d Cong., 2d Sess. at 13; *Gaffey*, 188 F.3d at 1025. The tribal allotments, “totaling approximately 262,300 acres, were not contiguous parcels of land. Rather, the individual allotments were scattered across the reservation and interspersed with approximately 168,000 acres of unallotted surplus land.” *Podhradsky*, 606 F.3d at 999. “[N]o single boundary line c[ould] encompass these lands.” *Gaffey*, 188 F.3d at 1017.

“By the end of the nineteenth century federal Indian policy had . . . reduced the [Yankton Sioux] Tribe’s land holdings from a sizeable communal reservation to a checkerboard of individual allotments intermingled with white homesteads.” *Podhradsky*, 606 F.3d at 1000. “The process of allotment and the liberalized issuance of fee patents under the Burke Act . . . reduced once coherent communities to jurisdictional checkerboards,” which remains true of the remnants of Indian country in Charles Mix County today. *Podhradsky*, 606 F.3d at 999, 1000. The area in question was a checkerboard from the start because Congress did not intend for the reservation to exist after the 1894 Act.

As in *Pelican*, Congress’ “evident purpose” with the 1894 Act was to “carve out” Indian trust patent allotments from land “restored to the public domain” as the

limit of Indian country within the former Yankton Sioux Tribe reservation. *Pelican*, 232 U.S. at 449. As respects the Yankton Sioux Tribe’s allotted lands, “Congress expressly . . . provided” for a checkerboard pattern from inception, knowing they would inexorably become more scattered and insular when, as intended, title to more and more allotments passed to non-Indians. *Pelican*, 232 U.S. at 449-450. 1151(c) accepts this historical reality; “1151(c) contemplates that isolated tracts of ‘Indian country’ may be scattered checkerboard fashion over a territory otherwise under state jurisdiction,” understanding that many “practical and legal conflicts” of jurisdiction might arise. *DeCoteau*, 420 U.S. at 429 n. 3.

While petitioner questions the practicality of a checkerboard pattern of federal jurisdiction today, over 100 years ago *Pelican*, using only the maps of the time, engaged in just such a micro-jurisdictional examination with regard to a crime that occurred on an individual Indian allotment surrounded by unallotted lands opened to non-Indian settlement. *Pelican*, 232 U.S. at 444 449-450 (“the territorial jurisdiction of the United States [does not] depend upon the size of the particular areas which are held for Federal purposes”). Today, the task is even easier with the existence of a digital database with up-to-date, parcel-by-parcel identification of land under federal jurisdiction in Charles Mix County.²

² See *Bureau of Indian Affairs Tract Viewer*, ArcGIS (visited July 18, 2026) <https://experience.arcgis.com/experience/49fe6d3b860d47c588db75074fa42309/page/Page>

As in *Podhradsky*, petitioner cites no allotment era “authority which requires that a reservation consist of compact, contiguous lands.” *Podhradsky*, 606 F.3d at 1002. Checkerboarding was by no means disfavored in the allotment era and unavoidably persists today as an “artifact resulting from shifting federal policy” across three different centuries of time. *Podhradsky*, 606 F.3d at 1002. The existence of checkerboarding here does not present a compelling federal question requiring this Court’s attention. *DeCoteau*, 420 U.S. at 429 n. 3.

3. No “Split”

There is no “split” here requiring this Court’s attention. First, there is no split between the South Dakota Supreme Court and the 8th Circuit concerning the fact that the subject allotment is not in Indian country. The 8th Circuit has unequivocally “concluded that those allotments which had passed out of Indian hands and into white ownership ha[ve] ceased to be part of the reservation.” *Podhradsky*, 606 F.3d at 1003. And, to the extent the 8th Circuit has speculated that residual “allotted lands that remain in trust, additional lands taken into trust, and ceded lands reserved by the 1894 Act” may form a non-contiguous “reservation” that survives to this day, the subject allotment land does not fall into any of these categories. *Corps of Engineers*, 606 F.3d at 897. So, both the South Dakota Supreme Court and the 8th Circuit agree that the subject allotment on which the Charles Mix County courthouse and jail stand is neither reservation nor Indian country.

Second, there is no split between the 8th Circuit’s *Gaffey* decision and the 7th Circuit’s decision in *Oneida Nation v. Village of Hobart*, 968, F.3d 664 (7th Cir. 2020), or this Court’s decision in *McGirt*. The *Hobart* court ruled that a town located within the Oneida Indian reservation could not require the tribe to file for a special event permit because, unlike here, there had never been “any change in the treaty-established boundaries” of the Oneida reservation. *Hobart*, 968, F.3d at 674. Unlike Lake Andes, the town of Hobart lies within the established boundaries of an extant Indian reservation, which, per 1151(a), is reservation land “notwithstanding the issuance of any patent” to a non-Indian purchaser. *Hobart* simply follows *Seymour v. Supt. Washington State Penitentiary*, 368 U.S. 351, 354 (1962), which found that the diminished Colville Indian reservation was Indian country when the diminishing act “expressly reaffirmed that [the diminished portion] was ‘still reserved by the Government for [the Colville Indians] use and occupancy.’” Unlike in *Seymour*, no land was “reserved” to the Yankton Sioux Tribe by the 1894 Act.

Hobart itself states that “*Gaffey* is distinguishable because the Eighth Circuit made clear that the loss of reservation status there was effected by a surplus land act of 1894 that applied specifically to the Yankton Sioux.” *Hobart*, 968, F.3d at 680. Because the Oneida had not suffered a “loss of reservation status” as the Yankton Sioux had, *Hobart* stated that *Gaffey* was “not applicable where the 1906 Oneida Provision did not contain similar provisions” to the 1894 Act. *Hobart*, 968, F.3d at 680. The *Hobart* rule relates only to 1151(a) land within an extant reservation boundary, which is not the case here, so there is no “split” between

Gaffey and *Hobart*. Petitioner has not identified an actual split requiring this Court's attention.

4. Article XIV

Petitioner's contention that Article XIV's guarantee that "Congress shall never pass any act alienating any part of these allotted lands from the Indians" established a reservation does not present a realistic question requiring this Court's attention. The textual and historical context for Article XIV reveals that it was intended to *speed up* the allotment process in response to perceived Congressional foot dragging. As previously discussed, the act of allotting lands in severalty divested the tribes of communal ownership, the "critical component of reservation status" at the time. *Yankton Sioux Tribe*, 522 U.S. at 346. So, accelerating the allotment process – barring a treaty provision maintaining the old or setting new reservation boundaries – was the exact opposite of forming a reservation.

Taken in context, this provision simply assured the prospective Indian allottees that allotments would be made "as speedily as possible" and, once received, would not be taken away. *Bruguier*, 599 N.W.2d at 374; *Gaffey*, 188 F.3d at 1028. "Nothing in this provision can be interpreted as precluding individual Indian owners from later transferring their property to non-Indians after the trust period expired" as provided for in Section 5 of the 1887 Act and the Burke Act. *Bruguier*, 599 N.W.2d at 374. This is corroborated by the contemporaneous historical record which reflects that the Tribe was assured "that you will not be forced to part with your lands [allotments] *unless you want to*." *Podhradsky*, 606 F.3d at 1008. Article

XIV acted only as a limitation on Congress' authority to alienate allottees from their land, not on an allottee's right to alienate an allotment at the right time. Petitioner's misreading of Article XIV does not present a compelling federal question requiring this Court's attention.

5. Resurrecting A Reservation

Contrary to petitioner's assertion that "tribes will lack predictable jurisdiction" unless this Court takes this case, there is no confusion or uncertainty concerning state, federal and tribal jurisdiction in Charles Mix County. PETITION at 28. The people of that county are not walking around in a state of perpetual confusion wondering "Who's on first?"

The *Yankton Sioux Tribe* Court did not feel the "need to determine whether Congress disestablished the reservation altogether in order to resolve [that] case." *Yankton Sioux Tribe*, 522 U.S. at 358. The same is true here.

To the extent petitioner believes that the "need to determine whether Congress disestablished the reservation altogether" poses a compelling federal question, this case is not an appropriate or viable vehicle to do so. As discussed above, the subject allotment is not within any category of potential residual reservation land identified by the 8th Circuit. Thus, the subject allotment lacks proverbial "standing" to claim reservation status because it is not embraced by any current concept of potential Yankton Sioux Tribe reservation land. *Corps of Engineers*, 606 F.3d at 897.

Like the *Yankton Sioux Tribe* Court, the South Dakota Supreme Court did not feel the “need to determine whether Congress disestablished the reservation altogether” in this case. *Winckler*, 33 N.W.3d at 72, ¶ 30. To the extent Justice Salter’s concurrence questions the *Bruguier* court’s disestablishment finding, Justice Salter’s concept of any such extant reservation, like the 8th Circuit’s, is limited to the few Indian-held “trust parcels” and tribe-owned land that persist today. *Winckler*, 33 N.W.3d at 83, ¶ 82; *Podhradsky*, 606 F.3d at 1003 (possible surviving reservation consists of “allotments continuously held in trust for the Tribe [and] . . . lands later taken into trust . . . pursuant to the 1934 Indian Reorganization Act”).

But even Justice Salter acknowledged that “none of that matters to the correct determination of [the state’s] jurisdiction” over the subject allotment on which the Charles Mix County courthouse and jail stand because this case “involves former allotted land that passed from Indian ownership at a time before Congress’ enactment of the Indian Reorganization Act of 1934.” *Winckler*, 33 N.W.3d at 72, ¶ 30. Because the current status of the Yankton Sioux Tribe reservation is not something “that matters” to the disposition of this case, petitioner’s challenge to “*Bruguier*’s disestablishment holding” is not a compelling federal question requiring this Court’s attention at this time.

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This case is about a single allotment of land on which the Charles Mix County courthouse and jail presently stand. In the treaty era it was Yankton Sioux

Tribe land. In the allotment era it became Indian-held trust patent land and then, upon the death of the allottee, non-Indian owned land outside the limits of any vestige of the Yankton Sioux Tribe reservation. The reorganization era had no effect on the allotment because by then its Indian title had been extinguished. Petitioner would have this Court de-extinguish the subject allotment's passage out of tribal and Indian title by retroactively applying reorganization era law to an allotment era conveyance. But as misguided or avaricious as allotment era history may seem today, or however much contemporary sentiment may wish that this history had unfolded more admirably, this Court "cannot remake history." *DeCoteau*, 420 U.S. at 449.

CONCLUSION

Winckler's petition for a writ of *certiorari* should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on Tucker Volesky at tucker.volesky@tuckervoleskylaw.com.

Dated this 22nd day of July 2026.

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