UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-1441

YANKTON SIOUX TRIBE, and its individual members, and UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Plaintiffs-Appellees,

UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,
v.
SCOTT J. PODHRADSKY, State's Attorney of Charles Mix County, et al., Defendants-Appellants,

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, Interested Party-Appellant.

No. 08-1488

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs-Appellants,

UNITED STATES OF AMERICA, on its own behalf and for the benefit of the Yankton Sioux Tribe, Intervenor Plaintiff-Appellee,
v.
SCOTT J. PODHRADSKY, State's Attorney of Charles Mix County, et al., Defendants-Appellees,

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, Interested Party-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge

REPLY BRIEF OF STATE APPELLANTS AND BRIEF OF STATE CROSS-APPELLEES

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INTRODUCTION

This brief serves both as a "Reply Brief" with regard to Civ. 08-1441 and a "Brief of State Cross-Appellees" with regard to Civ. 08-1488.[1]

The federal and tribal briefs rely on two major patterns of analytical error adopted by the District Court. First, the briefs and the court below refuse to honor the finding of the Supreme Court, and the finding of this Court, repeated four times in its 1999 decision, that the 1858 boundaries of the Yankton Reservation were eliminated in 1894.

Second, the briefs, along with the court below, avoid the congressional and judicial determination that "Indian country" is defined by 18 U.S.C. 1151, and that whether a piece of land qualifies as "Indian country" should be determined by whether it qualifies under one of the three classifications of land

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[1] The term "SA" refers to State's Appendix. Exhibits introduced at the 2007 trial have been forwarded separately to the Court. "SB" refers to the State's opening brief. "S.Add." refers to State's Addendum. "S.R.Add." refers to the Addendum to this brief. "2007 T." refers to the 2007 trial transcript, which has been forwarded to the Court. "T.Add." refers to the Tribal Addendum. "USB" refers to the federal brief. "U.S.App." refers to the federal appendix. "TB" refers to the Tribe's Brief.

carefully defined therein. Additionally, in a further attempt at avoidance of the issues, the federal brief relies heavily on allegations that the State waived certain issues below. Those arguments, however, fail because the arguments actually were timely made.

After fourteen years of litigation, the District Court has now defined its third version of a Yankton "Reservation" and the federal government urges this Court to ratify it even though the new version was unknown prior to the recent District Court decision, no map showed its existence, and no public officer supported its configuration. It is a novel "reservation" with constantly changing boundaries, and it was created out of whole cloth at the price of negating the meaning of 18 U.S.C. 1151. The current BIA map set out at S.Add. 142 illustrates the crazy-quilt "reservation" proposed by the federal brief: The land in light yellow is in fee title beyond the "reservation"—the "reservation" is constructed, somehow, out of the remainder (less the light blue lands).

ARGUMENT

A. *Indian owned fee lands are not "reservation" even if they have been continuously owned by Indians.*

This Court remanded this litigation to determine the "status of Indian lands which are *held in trust*." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) (emphasis added). The District Court exceeded the scope of this remand by declaring hypothetical former allotted lands, continuously owned by Indians in *fee* status, to be "reservation." *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040, 1056 (D.S.D. 2007). The District Court failed to "scrupulously and fully" carry out this Court's mandate, and its decision should be reserved. *Jaramillo v. Burkhart*, 59 F.3d 78, 80 (8th Cir. 1995). Alternatively, no viable legal argument supports Plaintiffs' position.

The United States essentially argues that, in the area of the 1858 Yankton Reservation, the path for moving land in allotted status (and thus beyond the jurisdiction of the State) to land subject to the jurisdiction of the State is a *three*-step process: (1) allotted status to (2) fee status in the individual

Indian who formerly held the land in allotted status to (3) fee status in a non-Indian. Under this theory, land in category (1) or (2) is "Indian country" because it is "reservation" as defined by 18 U.S.C. 1151(a), i.e., "all land within the limits of any Indian reservation . . . notwithstanding the issue of any patent." The "reservation" thus includes fee land held by a former allottee (none of which has been identified).

The State, in opposition to this theory, submits that, in the area of the former reservation, land in allotted status moves to land which is subject to the jurisdiction of the State by way of a two-step process: (1) allotted status to (2) fee status in an individual Indian or non-Indian.

Under the theory of the State, "allotted land" within the former boundaries is "Indian country" only when in category (1); such land holds "Indian country" status precisely because it is "allotted land, the Indian title to which has not been extinguished," 18 U.S.C. 1151(c), *not* because it holds "reservation" status under Section 1151(a).

The language of 18 U.S.C. 1151 should end the controversy. Over 230,000 acres have lost allotted status.

Gaffey, 188 F.3d at 1017, 1030. *See also* Ex. 209, S.Add. 142 (BIA map). In each case, the land lost "Indian country" status because the "Indian title" was at that moment "extinguished." 18 U.S.C. 1151(c).[2] The language of Section 1151(c) thus provides a direct route from "Indian country" to "non-Indian country" status by the transfer of the title of land from "allotted" to non-allotted status.

On the other hand, the transfer of parcel of "reservation" land from an Indian to a non-Indian does not, and cannot, doctrinally, change its status as "reservation." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("no matter what happens to the title of individual plots" on reservations, the land "retains its reservation status" unless Congress "explicitly" says otherwise); *Beardslee v. United States*, 541 F.2d 705, 707 (8th

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[2] It should be uncontested that "Indian title" was lost when the allotted status was surrendered. *See, e.g., Larkin v. Paugh*, 276 U.S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and incidental restriction against alienation was terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction."); *United States v. Rickert*, 188 U.S. 432, 436-37 (1903); *United States v. Pelican*, 232 U.S. 442, 447 (1914).

Cir. 1976) ("ownership of land alone by a non-Indian is not sufficient to change reservation status"). Thus, although the United States posits a three-step process to bring land from allotted status to land within the jurisdiction of the State, the process does not work because the United States wrongly postulates that the land is "reservation" under 18 U.S.C. 1151(a), and "reservation" land does not lose its status by virtue of a private transfer.

The United States argues that the State "incorrectly elevates" 18 U.S.C. 1151(a) in the analysis, and contends that this Court should instead discover "plain Congressional intent." USB 33. But nothing can be more "plain" than the language of 18 U.S.C. 1151(a) and (c); nor could the Supreme Court make more clear the obligation of the lower courts to follow the language of the statutes. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

History favors the approach of the State. The evidence conclusively demonstrates that when land left allotted status in the area of the former Yankton Reservation, it immediately lost Indian country status, whether retained by individual Indians

or not. For example, Ex. 667, S.R.Add. 1, a Letter of the Commissioner of Indian Affairs of August 20, 1930, recognizes that the United States did not retain jurisdiction over lands as they left allotted status:

> considerable of the land heretofore constituting a part of the reservation has passed out of Government control *through the issuance of fee patents to allottees* and purchasers, and that such land is now under the jurisdiction of the State and county authorities . . . .

(Emphasis added.) *See also* U.S. Ex. 19, S.R.Add. 2-3, Superintendent's 1926 Annual Report: "The only land subject to Federal jurisdiction are allotments held in trust scattered over the county and the agency reserve"; U.S. Ex. 19, S.R.Add. 4-5, Superintendent's 1927 Annual Report (same). Plaintiffs identify no contrary evidence.

This Court also set the end of supervision of Indians at the time land was transferred to them in fee: "[u]ntil the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non-Indians." 188 F.3d at 1028. No evidence supports any continuing jurisdiction over tribal members on fee land,

regardless of whether the individual Indian still owned land once allotted to him.

B. *Allotted lands within the former reservation are not "Indian country" because they are "reservation" under 18 U.S.C. 1151(a) but they are "Indian country" because they are "allotments" under 18 U.S.C. 1151(c).*

The District Court found (and United States agreed) that allotted lands within the 1858 reservation are "Indian country" for the reason that they are "reservation" under 18 U.S.C. 1151(a): "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 529 F.Supp.2d at 1053; USB 31-36.

The argument that "allotted lands" within the former reservation boundaries are "reservation" under 18 U.S.C. 1151(a), and not simple "allotted lands" under 18 U.S.C. 1151(c) is dependent on the argument reviewed in the section above, and fails for the same reasons.

When "allotted lands" within the former Yankton Reservation lose their allotted status, they are, and should be, treated as no longer "Indian country." This is consistent with the definition of "allotted lands" which retain "Indian country"

status only so long as the "Indian titles . . . have not been extinguished." 18 U.S.C. 1151(c).

Reservation lands, on the other hand, *retain* their "reservation" status on their transfer. *Solem*, 465 U.S. at 470. Thus, when allotted lands take the three-step process to fee status in the individual Indian and even to a non-Indian, their status is not changed if they are "reservation" lands. If this theory of the case is correct, this Court's holding in *Gaffey*, 188 F.3d at 1030, that former allotted lands (over 230,000 acres) are no longer "Indian country" is undermined.

Adoption of the federal theory, and that embraced by the District Court, thus would upset the doctrinal applecart, both as it pertains to what this Court has held to have already happened in the area of the former Yankton Reservation, and with regard to the meaning and application of 18 U.S.C. 1151 statewide and nationally.

The United States admitted, in a backhanded way, the doctrinal problem in a long, convoluted footnote in its "Brief for the United States in Opposition [to Certiorari]" in 1999. U.S.App. 52 n.9. But it simply ignores it here.

The federal brief also asserts that the matter is not actually of much concern to the state. USB 35. In fact, it is, for doctrinal inconsistency as to the status of lands creates inevitable difficulties in civil and criminal jurisdiction. Prior federal decisions had carefully distinguished between "reservation" lands and "allotted lands" in every other location in South Dakota. For example, Mellette, Tripp, and Gregory Counties were held to be outside of the Rosebud Reservation in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 n.48 (1977), which also found that *"[T]o the extent* that members of the Rosebud tribe are living on allotted land outside the Reservation" within these counties, they too are on "'Indian country.'" (Emphasis added.) *See also United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997). *United States ex rel. Cook v. Parkinson*, 525 F.2d 120, 121-22 (8th Cir. 1975) similarly found, in effect, that lands in Bennett County, which is not within the Pine Ridge Reservation, were "Indian country" only if they remained in "allotted" status. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) essentially declared that lands in parts of Roberts, Day, Marshall, Grant, and Codington

Counties also qualify as "Indian country" only if they remained as "Indian allotments . . . 18 U.S.C. 1151(c)."

In each of these eight counties, land may be found to be "Indian country" because it is "allotted land" under 18 U.S.C. 1151(c), not because it is "reservation." 18 U.S.C. 1151(a). These decisions faithfully follow the direction of the Historical and Revision Notes to 18 U.S.C. 1151 which state that "Indian allotments were included in the definition [i.e., as 18 U.S.C. 1151(c)] on authority of the case of *United States v. Pelican*, [232 U.S. 442 (1914)]." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 529-30 (1998) validates this analysis.

Only in eastern Charles Mix County, and nowhere else in South Dakota or the nation, is it proposed that "allotted lands" not within the boundaries of a reservation be accorded "reservation" status, under 18 U.S.C. 1151(a), instead of "allotted lands" status under 18 U.S.C. 1151(c). And *only* in eastern Charles Mix County does the United States propose that a "reservation" be recognized which, it admits, lacks a

"continuous exterior boundary" (USB 34), and which can change from day to day.

C. *Lands taken into trust within the former boundaries of the reservation do not automatically become "reservation" under 18 U.S.C. 1151(a).*

1. *No formal reservation has been created under 18 U.S.C. 1151(a).*

Congress distinguished between the creation of "trust land" and of "reservations" in the Indian Reorganization Act of 1934, specifically in 25 U.S.C. 465 and 467. In this case, there has been no "proclamation" that land taken into trust under 25 U.S.C. 465 constitutes a "reservation" under 25 U.S.C. 467, nor has there been any proclamation (or any documentation of any kind) demonstrating that the Secretary has "added" any lands "to existing reservation."

The central argument of the District Court and the federal brief is that 25 U.S.C. 467 is irrelevant to land taken into trust under 25 U.S.C. 465 because "'it is redundant to proclaim the land a reservation when it is acquired for the tribe within a reservation that is not disestablished.'" *Podhradsky,* 529 F.Supp.2d at 1054, quoted at USB 40. The federal brief

likewise argues that because the reservation has existed since 1858 "there is no need to declare a new reservation each time a tract of land within its original boundaries is taken into trust." USB 40.

Reduced to its essentials, the court below and the federal government assert that the 1858 boundaries exist, that land taken into trust within an existing reservation boundary is "reservation" and that it would "redundant" to proclaim it so. But *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345-47 (1998), ruled that the boundaries were gone; likewise, this Court ruled four times in 1999 that the 1858 boundaries did not "continue to have effect," 188 F.3d at 1013; "did not remain intact," *id.* at 1021; did not "serve to separate" state and federal jurisdiction, 188 F.3d at 1021; and had "not been maintained." *Id.* at 1030.

The federal brief implies that 25 C.F.R. 151.2(f) affects the "reservation" status of lands. USB 40. This section, however, provides only that 25 C.F.R. 151.11 does not apply to certain trust acquisitions; it does not pronounce all land taken into

trust as "reservation" for the purpose of 18 U.S.C. 1151, nor could it.

In fact, multiple federal statutes *do* distinguish between "trust land" and "reservations" (as do multiple federal regulations), another critical fact the federal and tribal briefs carefully ignore. SB 32 nn.2, 3. The Amicus Brief of the Rosebud Sioux Tribe at 5 n.2 supports the State's analysis in this regard, demonstrating that the term "reservation" for the purpose of the Indian Child Welfare Act "means 'Indian country' as defined in 18 U.S.C. 1151, *and* any lands not covered under this section, title to which is either held by the United States in trust for the benefit of any Indian tribe." *Id.* (emphasis added). If all trust lands were already reservation, the language directing that they be treated as "reservation" for the purpose of other statutes and regulations would be redundant.

2. *No informal or de facto reservation has been created either (a) automatically by taking land into trust or (b) through some trust land plus factor as identified in Azure or otherwise.*

In an alternative approach, the District Court found the existence of an "informal" or "de facto" reservation for all lands

taken into trust after 1934 on the basis that a BIA employee "maintains all leases on trust lands on the Yankton Sioux reservation," and that an FBI agent testified that the "FBI exercises criminal jurisdiction over all trust land on the Yankton Sioux Reservation." 529 F.Supp.2d at 1055.

The federal brief seeks affirmance of the *decision* of the District Court, but simultaneously acknowledges, at least implicitly, that the District Court's *rationale* is wholly insufficient, by failing to argue that the mere maintenance of leases and the exercise of criminal jurisdiction are sufficient to create a de facto reservation. USB 40-48.

a. *No informal or de facto reservation is automatically created by the taking of land into trust under 25 U.S.C. 465.*

The idea that an informal or de facto reservation is automatically created by the taking of land into trust is directly inconsistent with *Stands,* 105 F.3d at 1572. The United States argues that *Stands* should be interpreted to mean that "off-reservation land taken into trust is not part of a formal reservation but *may* well constitute a de facto or informal reservation." USB 46 (emphasis added). That description at

least recognizes that this Court has found that merely taking land into trust does not *automatically* make it into a "de facto" or "informal" reservation.

Stands held that merely because land was taken into trust in Mellette County, in an area which was formerly reservation, it was not "Indian country." *Id.* at 1573. This finding made necessary the second finding, i.e., that certain land in Mellette County was "Indian country" because it was an "allotment" under 18 U.S.C. 1151(c). The second finding was superfluous without the first (i.e., that the mere acquisition of land in trust did not make it "Indian country") and the first finding is therefore necessarily an integral part of the "prior panel opinion." The United States demands that this Panel abandon *Stands*, but, as this Court has stated: "Under our long-standing practice, only the en banc Court can overrule a prior panel opinion." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995). *See also South Dakota v. U.S. Department of the Interior,* 487 F.3d 548, 553 (8th Cir. 2007) (court on rehearing essentially vacates district court

finding that merely taking land into trust makes it "Indian country").

Moreover, the argument that merely placing lands into trust under 25 U.S.C. 465 makes them "Indian country" squarely contradicts the repeated ruling of the Supreme Court that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal government' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). 25 U.S.C. 465 allows the Secretary to take land into trust and provides that it is "exempt from state and local taxation." *Id.* There is no "unmistakably clear . . . language" in 25 U.S.C. 465 which provides that the state forfeits its *other* criminal and civil jurisdiction, such that the land becomes "Indian country," and that Congress intended the "constitutional balance" to so decisively tip on the taking of land into trust.

Further, neither Plaintiff (nor the court below) has been able to answer the doctrinal question of what occurs when

lands acquired in trust under 25 U.S.C. 465, which they claim are "reservation" under 18 U.S.C. 1151(a), are again conveyed *out of* trust status. Yankton Superintendent Lake testified that it made no difference whether a piece of former trust land had been acquired under the 1934 Act or whether it was allotted land; *neither* would be treated as "reservation" when it left that status. 2007 T.24, lines 8-10; 2007 T.25, lines 3-7.

But if the 1934 Act trust lands are "reservation," they do *not* lose "reservation" status under 18 U.S.C. 1151(a) when conveyed into fee status: Under the text of § 1151(a), a "reservation" encompasses "all land" within the limits of the reservation "*notwithstanding the issuance of any patent*." *See Solem*, 465 U.S. at 470.

It cannot be logically advocated that lands in the former Yankton Reservation area which go into trust under 25 U.S.C. 465 are "reservation" because all courts, and the BIA itself, acknowledge that the subsequent loss of trust status leaves the lands without "Indian country" or "reservation" status. *See* Section B, *supra*.

Plaintiffs have also failed to address the inconsistency of the primary purpose of the IRA—"to end paternalism"—H.R. Rep. 1804, 73d. Cong., 2d Sess. (1934) at 6, *quoted at Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)—with their theory of the IRA (including 25 U.S.C. 465), i.e., that the mere acceptance of land into trust under 25 U.S.C. 465 implies that the United States thereafter will "effectively act[] as a guardian for the Indians." *Venetie*, 522 U.S. at 533. *See also United States v. Mitchell*, 463 U.S. 535, 536 (1980) (even General Allotment Act did not create "fiduciary responsibility" for the management of land).

b. *No informal "reservation" is created under a trust land plus theory under Venetie or Azure.*

The federal brief also seems to argue, in the alternative, that if mere trust status is not enough, then perhaps some trust land plus argument might succeed in proving that land taken into trust off reservation under 25 U.S.C. 465 is "reservation."

Plaintiffs strive mightily to avoid *Venetie*, but it controls. *Venetie* establishes that the question of whether "Indian

country," and necessarily any type of federal "reservation," is created depends not on the mere *fact* of federal ownership or set-side but goes to the "'*degree* of federal ownership and control'" and the "'*extent to which* the area was set aside.'" 522 U.S. at 531 n.7 (emphasis added). Thus, *Venetie* found that the Pueblos had been found to be "Indian country" because the lands at issue were "under the absolute jurisdiction and control of the Congress of the United States." *United States v. Sandoval,* 231 U.S. 28, 37 n.1 (1913), *quoted at Venetie,* 522 U.S. at 533-34.

The evidence reveals, however, *no* control over some trust lands and only minimal control and set-aside of other trust lands at issue here. All that is offered is that the BIA had some hand in leasing some lands at issue in this case. There is no assertion that (1) *all* of the trust lands have been leased, *see also* 2007 T.206, lines 19-25 to 2007 T.207, lines 1-4; 2007 T.208, lines 23-25, *see also* U.S. Ex. 202a, at U.S.App. 198-208, and (2) no proof of the *degree* of supervision as to the lands which have never been leased, and only fragmentary evidence with regard to lands which have been leased.

Further, Plaintiffs have been unable to defend the District Court's reliance on FBI testimony, because the FBI actions concern, in no way, the essential "superintendence of land" demanded by *Venetie*, 522 U.S. at 533 ("superintendence of lands" required for finding of "Indian country" such that government was "effectively acting as a guardian for the Indians"). Exercise of criminal jurisdiction is not "superintendence of lands."

The federal brief repeatedly relies on *United States v. Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986) which found that a "key factor" in determining whether "Indian country" had been created was the expenditure of federal "funds and providing social services." *Venetie*, 522 U.S. at 534, entirely undermines *Azure*, finding "our Indian country precedents . . . do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country."

Plaintiffs also continue to rely on *Oklahoma Tax Comm'n v. Citizen Band of Potawatomie Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), even though it does not involve land taken into trust under 25 U.S.C. 465 or the IRA. The federal plaintiffs

claim that *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999) "considered this precise issue" and rejected it. USB 44-45. This assertion is inaccurate. *Roberts* contains no consideration of the "precise issue" of whether *Oklahoma Tax Comm'n*, a case involving a particular congressional directive to take particular land into trust, ought to be distinguished from a situation in which lands were taken into trust under the IRA (specifically under 25 U.S.C. 465), nor whether the congressional intent was identical in each.

D. *Lands not taken into trust are not in trust.*

The United States claimed that 6444.47 acres had been taken into trust under the IRA and asked the District Court to declare that because these lands were within a former reservation they should be declared to be "reservation." *See* Ex. 202/Corr. U.S.App. 121-25.

On review of the deeds, however, it was apparent that, while 3,120.98 acres were evidenced by written acceptance into trust, another 3,323.49 acres lacked any such acceptance. *Id.*

The United States does not frontally attack the thesis that it can act only through agents authorized to act and that an

authorized agent must accept any offer to place land in trust. And it cannot show either with regard to 3,323.49 acres. SB 49-52.

Rather, the United States claims that the Quiet Title Act (QTA) does not allow the State to claim that lands not accepted into trust are not actually in trust. The QTA, however, is irrelevant for it concerns a suit to divest the United States of title. Neither South Dakota nor the County has brought an action challenging the title of the United States. Rather, the *United States* as Intervenor has sued the County and various state officers seeking an end of its own. The State and County are simply defending a lawsuit. This case is analogous to *United States v. Phillips*, 362 F.Supp. 462 (D. Neb. 1973) in which the United States, after bringing its own lawsuit, unsuccessfully attempted to have a counterclaim for part of the land dismissed.

This case is, in fact, one step removed from *Phillips* in that there was not even a need to bring a counterclaim because Defendants do not seek possession of the land; rather, they seek merely a full and fair decision on the "status of lands in

trust" as required by this Court, which necessarily entails a determination of which lands were actually in trust.

E. *The Tribe's forced fee claims should be denied.*

The Tribe raises, by way of its own Notice of Appeal, the issue of whether the District Court improperly denied its opportunity to litigate the "status of allotted lands taken by forced fee patents." TB 38.

The court below found that the issue was "beyond the scope of this litigation." *Yankton Sioux Tribe v. Gaffey*, 2006 WL 3703274, at *3 (D.S.D.). T.Add. 3. The District Court was correct in refusing to allow the litigation of forced fee patents, but for the wrong reason and its decision should, in this respect, be affirmed. *United States v. Stephens*, 65 F.3d 738, 741 (8th Cir. 1995).

1. *Dismissal of the claim is appropriate because it has been waived.*

The court below found that the forced fee "claim was not previously raised before this Court and as a result was not considered by the superior courts." *Gaffey*, 2006 WL 3703274,

at *3. Based on this finding, the District Court should have found that the claim had been waived.

Morris v. National Can Corp., 988 F.2d 50, 52 (8th Cir. 1993), rejected an attempt to make an argument on remand, finding that it had been "waived" because it had not been made in the first round of the litigation. Similarly, *In re MidAmerican Energy Co.,* 286 F.3d 483, 487-88 (8th Cir. 2002), found that "'claims not raised in the initial appeal brief are waived.'" Here an attempt is made to raise claims not raised in two prior cases before this Court.

2. *The issue was not properly raised below.*

The forced fee claim should also be denied because it was not properly raised below by an appropriate offer of proof in the present proceeding. The Tribe claimed below that it had a map which it would eventually offer, Doc. 190, at 13-14, S.R.Add. 7-8, but no such map was ever introduced. As in *Holst v. Countryside Enterprises Incorporated*, 14 F.3d 1319, 1323 (8th Cir. 1994), the argument of the Tribe "must fail because [it] failed to make the requisite offer of proof to preserve the issue for appeal." *See also United States v. Kirkie*, 261 F.3d 761, 767

(8th Cir. 2001): ("even if an issue is raised pre-trial . . . an attorney must make an offer of proof during the trial to preserve the issue for appeal") .

A list of alleged forced fee patents is in the record, offered in one of the prior proceedings by the State. *See* SA 432-39. The list does not, however, identify the location of the parcels, their acreage, or their histories. Finally, the Tribe did not demonstrate that any parcel constituted "Indian country" under the minimum test set out in *Venetie,* 522 U.S. at 531-32 which requires a showing of "federal set aside" and "federal superintendence."

3. *The argument that forced fee lands should be declared "reservation" is frivolous and vexatious.*

The argument that lands conveyed to Indians by way of the Burke Act and the forced fee policy are today "reservation" is frivolous. *Nichols v. Rysavy*, 809 F.2d 1317, 1320 (8th Cir. 1987), rejected a wide-ranging attempt to void Burke Act transfers—made from 1916 through 1921—on the grounds, inter alia, that the statute of limitations barred the action

against the United States and potentially on the grounds that the claim was barred under 25 U.S.C. 347.

Nichols illustrates that the grant of the fee patents at issue was in accord with the congressional philosophy underlying the Burke Act, which "placed the responsibility" for issuing fee patents in the Secretary of the Interior because he "knows best" when tribal members are "capable of managing their own affairs." 809 F.2d at 1322. Further, *Nichols* found that the Burke Act was "'intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefit therefrom for Indians determined to be competent.'" *Nichols*, 809 F.2d at 1322.

Finally, the claim is vexatious. In the two prior phases of this case, the Tribe and the United States asserted, but the courts ultimately rejected, claims that substantial swaths of non-Indian lands constituted "reservation." This is yet another unreasonable attempt to upset the justifiable expectations of non-Indians who now own such lands.

F. *The District Court properly found that the 1927 Act did not "freeze" the boundaries of any reservation.*

1. *The Tribe has waived the argument that the 1927 Act "froze" the boundaries of the reservation.*

The District Court acknowledged that the claim that the 1927 Act "froze" the reservation boundaries was not made in the prior two phases of the case, finding the 1927 Act argument to be one of "two new arguments." 2006 WL 3703274, *2, T.Add. 02. *Morris*, 988 F.2d at 52, and *MidAmerican Energy Co.,* 286 F.3d at 487-88, discussed above, establish that waiver occurs when, in prior phases of the litigation, a party does not raise a claim. That occurred here.

The District Court found that waiver did not apply to the 1927 Act argument because it is "similar in nature to the arguments regarding the 1934 Act" and because this Court legitimized, somehow, the 1934 argument. 529 F.Supp.2d at 1049.

Neither argument succeeds. First, there is no authority supporting the proposition that, when an argument is made, it preserves "similar" arguments. Second, the two statutes at issue here—the 1927 Act and the 1934 Act—are *not* similar; they are separated by seven years, and have entirely

distinguishable texts. The 1927 Act was passed with a self-evident narrow purpose (to deal with problems of executive order reservations), while the 1934 IRA was passed as part of a comprehensive attempt at reform of Indian law. In addition, no "clear error" under "current law," justifies further review. *United States v. Olano*, 507 U.S. 725, 734 (1993).

Second, contrary to the assertion of the court below, 529 F.Supp.2d at 1049, this Court did not find, in its 1999 decision, that the Tribe was free to make new arguments based on the 1934 Act.

2. *The District Court's alternative finding that the 1927 Act applies only to "Executive order" reservations is correct.*

The District Court correctly found, nonetheless, that the Tribe's 1927 Act argument should be rejected because the Act applied only to "Executive order" reservations, and Yankton was not such a reservation. 529 F.Supp.2d at 1049-50.

First, the Act's title refers to "leases . . . within Executive order reservations." 44 Stat. 1347 (Mar. 3, 1927). T.Add. 27. The Act's text refers to changes in boundaries of "reservations created by Executive order, proclamation or otherwise." *Id.*

The Tribe claims that the term "or otherwise" demands that all "reservations" be included within the statute. But the language more naturally refers to reservations created by the executive, through an order, a proclamation or in some other way. The Tribe's version of the statute suggests that Congress should not have used the term "Executive order" at all. Its version improperly characterizes statutory language as superfluous. *Missouri v. Andrews*, 787 F.2d 270, 284 (8th Cir. 1986).

The legislative history demonstrates that the statute was passed only after the Attorney General issued an opinion that the "general leasing act did not apply to the Executive order reservations." 68 Cong. Rec. 2794 (1927). Ex. 118. The distinction between Executive order and treaty reservations was clearly pointed out on the House floor: "Now let us go just a little into the history of the difference between a treaty reservation and an Executive-order reservation." *Id.* at 4571. Finally, *Sioux Tribe v. United States*, 316 U.S. 317, 325 n.6

(1942) found that the 1927 Act applied to "executive order reservations."[3]

3. *The Yankton Reservation has never been an "Executive Order" reservation.*

The Tribe claims that its reservation was created by Executive Order; on the contrary, *Yankton*, 522 U.S. at 333 held that it had been created by "treaty." *See* 11 Stat. 743 (1858).

4. *Even if the Act did apply to Yankton, it did not contravene the Act of 1894.*

Even if the 1927 Act did apply to Yankton (and by implication, all treaty reservations), it did not "freeze" the boundaries of the reservation (assuming that a reservation even existed at this time) because the intent of the 1894 Act was to reduce tribal jurisdiction as tribal members surrendered Indian title to their lands. The general nature of the 1927 Act does not stand in the way of the operation of the specific statute adopted in 1894. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S.

[3] The Tribe's reliance on *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (10th Cir. 1976) is improvident because it concerns an "Executive order" reservation. *Id.* at 681.

437, 445 (1987) (specific statute prevails over general statute, regardless of date of enactment).

G. *The 1934 Act did not freeze the boundaries of the Yankton Reservation.*

The District Court ruled that Sections 2 and 4 of the 1934 Act "froze" the boundaries of the Yankton Reservation but that the effect of the freeze was dissipated by the passage of the 1948 Act. 529 F.Supp.2d at 1050. The State agrees that the effect of any "freeze" was eliminated by the 1948 Act, but it disagrees that there was any "freeze" embedded in the 1934 Act.[4]

Section 2 of the IRA provides that the "existing periods of trust placed on any Indian lands . . . are hereby extended and continued until otherwise directed by Congress." *See* 25 U.S.C. 462. The section merely codified what had been accomplished earlier by executive order. *See, e.g.*, Executive Order 2363 (1916) at SA 425. Moreover, prior to 1934, the existence of a

[4] This claim was also waived because it was not made in the earlier cases. *Morris*, 988 F.2d at 52.

trust period did not prevent the issuance of patents in fee. *Nichols*, 809 F.2d at 1322.

Section 4 of the IRA (25 U.S.C. 464) provides that no "sale, devise, gift or exchange" of "restricted Indian lands" shall be allowed. This stopped individual Indians and tribes from transferring their trust or restricted lands directly to others. But it does not restrict the *United States* from granting an individual Indian the fee patent to his own land, at least on his own application. *See also* SB 74-76.

The federal brief incorrectly implies at USB 56-57 that *Oglala Sioux Tribe v. Hallett*, 708 F.2d 326 (8th Cir. 1983) supports the "freezing" theory. *Hallett*, 708 F.2d at 330 n.6, to the contrary, states that the debate on "section 4" of the IRA indicates that it was aimed at "preventing the sale of individual allotments to non-Indians" when an allottee died with "numerous" heirs, "*rather than at restricting the issuance of fee patents to allottees on proper application therefore*." (Emphasis added.) *Hallett* adds a quotation from the legislative history that "'These provisions do not apply to . . . any Indian owner of

restricted land who may be declared competent by the Secretary of the Interior.'" *Id.*

H. *Lands ceded to the United States in 1894 as "agency" lands are not "reservation."*

Yankton found that "unallotted lands ceded as a result of the 1894 Act did not retain reservation status." 522 U.S. at 342. The agency lands were "unallotted lands" and they were "ceded" to the United States. *Gaffey,* 188 F.3d at 1019. Therefore, they did not "retain reservation status."

Two major arguments are offered in avoidance of *Yankton*. First, the federal brief claims that the "law of the case" controls, and that the State did not argue that the "law of the case" would be inapplicable below. USB 29, 58-74. This is incorrect. The United States, in its argument below on "reserve land" made a single reference to "law of the case" but did not support it with a case citation or argument, thereby itself waiving the argument. Doc. 346, Brief of the United States at 17-19. The United States also made a separate argument that the "mandate rule" applied, and described it as a "'more powerful version of the law of the case doctrine.'" *Id.* at 20 (quoting

Invention Submission Corp. v. Dudas, 413 F.3d 411, 415 (4th Cir. 2005)). The State answered with a variety of arguments and noted that "exceptions to the mandate rule as set out in *Invention Submission*" applied and described why that was so, in the context of the reserve land argument. Doc. 373, State and County Reply Brief, S.R.Add. 9-13.

The federal law of the case argument relies heavily on a case it describes as decided by this Court (USB vi, 64, 67), but, in fact, *United States v. Becerra,* 155 F.3d 740 (5th Cir. 1998) was decided by the Fifth Circuit, and has been abrogated, albeit on different grounds. In any event, the law of the case argument fails for substantially different evidence has been introduced and the decision was clearly erroneous. *Maxfield v. Cintas Corp.*, 487 F.3d 1132, 1135 (8th Cir. 2007). At the time of *Gaffey* in 1999, no party made any argument on the reserved lands to this Court on the prior appeal; the parties did not even know where the lands were at the time of the decision, as they

do now;[5] there had been no testimony that the FBI would *not* treat the lands as "reservation" merely because they were "agency" lands, as there is now, 2007 T.37, lines 1-4, *see also* 2007 T.54, lines 7-13; no court had considered the legislative history of the critical 1929 Act, as has now occurred; this Court in 1999 invited the County to place new information about the agency lands into the District Court on remand (SA 300); and finally, as the United States openly admitted to the Supreme Court, the Panel Opinion they so adamantly support here "did not articulate its rationale" for the agency land determination (U.S.App. 20) and argued that *Gaffey* was, moreover, merely "interlocutory." *Id.* at 54.

The United States also argues that the "reserved" lands must be "reservation" because the "Reservation" "include[s] those lands within it." USB 30. This merely rehashes the argument rejected by the Supreme Court, this Court (four

[5] The federal brief incorrectly equates submission of evidence at the time of the request for *rehearing* with evidence argued before the Panel. USB 69.

times), and the District Court, that the 1858 boundaries still exist.

The reserved lands argument is a critical lynchpin in the determination of disestablishment or diminishment, for only these lands were declared "reservation" in *Gaffey*. To foreclose a complete opportunity to argue the issue would be contrary to the rules of appellate procedure and to the idea of justice which the rules are intended to promote.

I. *The Reservation has been disestablished.*

As discussed, this Court made only a single determination that "reservation" exists within the 1858 boundaries, i.e., that concerning "agency lands." Further, as discussed above, that determination is not properly subject to the law of the case or mandate doctrine, and should be reexamined, leading directly to the conclusion that the question of disestablishment-diminishment should itself again be considered, especially given the contrary decision of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999). *See also* State's Petition on Rehearing, U.S.App. 1-15.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and this Court should find that the reservation has been disestablished, or, in the alternative, should find that the reservation has been diminished in accordance with the individual arguments made above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Reply Brief of State Appellants and Brief of State Cross-Appellees is within the limitation provided for in Rule 32(a)(7) using bookman old style typeface in 14 point type. Reply Brief of State Appellants and Brief of Cross-Appellees contains 6,948 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2002, and it is herewith submitted in PDF format.

3. I certify that the disk submitted herein with the text of the brief is, to the best of my knowledge and belief, virus free.

Dated this 20th day of November, 2008.

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John P. Guhin
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Reply Brief of State Appellants and Brief of State Cross-Appellees and computer diskette containing Reply Brief of State Appellants and Brief of State Cross-Appellees in the matter of Yankton Sioux Tribe, et al. v. Scott Podhradsky, et al. were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 20th day of November, 2008:

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