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, Plaintiff-Appellee

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., Appellants

Southern Missouri Waste Management District, Interested Party-Appellant

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No. 08-1488

Yankton Sioux Tribe, and its individual members, Plaintiff-Appellant

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

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Appeal from U.S. District Court for the District of South Dakota

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BRIEF OF APPELLEE UNITED STATES OF AMERICA

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), this Court determined that the Yankton Sioux Indian Reservation had not been disestablished. The Court also held the Reservation included land ceded by the Yankton Sioux Tribe but reserved for Indian agency, school and other purposes and later returned to tribal control. However, this Court concluded that the Reservation has been diminished by the transfer of former Indian allotments to non-Indian fee owners. Left unresolved by Gaffey was the current size and composition of the diminished Reservation. Accordingly, the Court remanded the case for further proceedings, which the Court indicated should include determining the amount, location and particular category of trust status of Indian lands within the Reservation's original boundaries.

The district court entered judgment after a trial designed to address the issues identified in the Gaffey mandate. The State and County have appealed, again arguing the Reservation has been disestablished, and also arguing the district court erred in identifying and classifying the lands that continue to be part of the Reservation. The Tribe has cross-appealed, challenging the district court's determination of several issues raised during the remand proceedings including whether the boundaries of the Reservation were frozen by operation of law in either 1927 or in 1934. The United States has not appealed and urges this Court to affirm the district court's judgment.

The United States requests 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

These two consolidated appeals seek review of a final judgment of the district court following a limited remand from this Court. The Plaintiff is a federally recognized Indian tribe, and the controversy arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. Accordingly, the district court had federal subject matter jurisdiction over the case by virtue of 28 U.S.C. §§ 1331 and 1362. The district court entered its judgment on December 19, 2007. 98-CR 429.[1] The individually named defendants are state and county officials appearing in their official capacities. The defendants filed a single, timely notice of appeal on February 13, 2008. 98-CR 433. The Tribe timely filed its appeal on February 15, 2008. This Court has appellate jurisdiction under the provisions of 28 U.S.C. § 1291.

[1] The State of South Dakota and Charles Mix County will be collectively referred to as "the State" unless otherwise indicated. The district court clerk's docket in the original district court proceeding is referred to as "94-CR" followed by the relevant docket number. References to the district court clerk's record in the 1998 consolidated action will be listed as "98-CR" followed by the relevant docket number. Citations to the transcript from the November 13-14, 2007, court trial will be indicated as "TT," and the separate transcript of the closing arguments will be indicated as "CA," followed in each case by the relevant page number. The transcript of the November 2, 2007, motions hearing will be cited as "MH" followed by the appropriate page number. The Government's appendix will be cited as "USA" followed by the relevant page number.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT CORRECTLY APPLIED THIS COURT'S MANDATE IN YANKTON SIOUX TRIBE v. GAFFEY AND CORRECTLY DETERMINED THAT LAND RESERVED UNDER THE 1894 ACT AND ALL OTHER TRUST LAND CONSTITUTE PART OF THE DIMINISHED YANKTON SIOUX RESERVATION, OR, ALTERNATIVELY, THAT THE TRUST LAND IS INDIAN COUNTRY AS AN INFORMAL RESERVATION OR DEPENDENT INDIAN COMMUNITY.

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999)

Solem v. Bartlett, 465 U.S. 463 (1984)

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005)

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)

II. WHETHER THE DISTRICT COURT CORRECTLY REJECTED, AS BOTH UNREVIEWABLE AND WITHOUT MERIT, THE STATE'S CLAIM THAT LAND TAKEN INTO TRUST PURSUANT TO THE INDIAN REORGANIZATION ACT IS NOT VALIDLY IN TRUST WITHOUT A FORMAL DECLARATION BY INTERIOR THAT IT IS RESERVATION LAND.

Ducheneaux v. Secretary of the Interior, 837 F.2d 340 (8th Cir. 1988)

Riley v. United States, 486 F.3d 1030 (8th Cir. 2007)

Kansas v. Kempthorne, 516 F.3d 833 (10th Cir. 2008)

III. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION WERE NOT FROZEN BY OPERATION OF 25 U.S.C. § 398d BUT, PURSUANT TO THE GAFFEY RULING, THEY WERE TEMPORARILY PREVENTED FROM FURTHER DIMINISHMENT BY THE INDIAN REORGANIZATION ACT.

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942)

Oglala Sioux Tribe v. Hallett, 708 F.2d 326 (8th Cir. 1983)

Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987)

IV. WHETHER THE STATE WAIVED ITS ARGUMENT THAT THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO THIS COURT'S HOLDINGS IN YANKTON SIOUX TRIBE v. GAFFEY BY NOT PRESENTING THE ISSUE TO THE DISTRICT COURT.

United States v. Unit No. 7 and Unit No. 8 in the Grove Condominium, 890 F.2d 82 (8th Cir. 1989) (en banc)

Fjelsta v. Sogg Dermatology, PLC, 488 F.3d 804 (8th Cir. 2007)

V. WHETHER THE LAW OF THE CASE DOCTRINE PRECLUDES THE STATE AND THE COUNTY FROM CHALLENGING IN THIS APPEAL THE COURT'S PRIOR HOLDINGS THAT THE YANKTON SIOUX RESERVATION WAS NOT DISESTABLISHED AND INCLUDES LAND RESERVED UNDER THE 1894 ACT.

Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing and Urban Dev., 807 F.2d 1433 (8th Cir. 1986)

Omaha Indian Tribe v. Jackson, 854 F.2d 1089 (8th Cir. 1988)

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999)

Maxfield v. Cintas Corp., 487 F.3d 1132 (8th Cir. 2007)

STATEMENT OF THE CASE

In September 1994, the Yankton Sioux Tribe commenced a civil action against Southern Missouri Waste Management District ("Southern Missouri") – an entity formed by several counties in South Dakota that acquired a site for a landfill – relating to the exercise of tribal civil jurisdiction. 94-CR 1. Southern Missouri filed a third party complaint and added the State of South Dakota ("the State") as a party to the litigation. 94-CR 5. The district court denied the Tribe's request for a temporary restraining order and a preliminary injunction and also denied Southern Missouri's motion for summary judgment. 94-CR 10, 86.

The district court issued a memorandum opinion and order on June 14, 1995, generally finding in favor of the Tribe. 94-CR 100. Southern Missouri and the State appealed, and this Court affirmed the district court's judgment on October 24, 1996. Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 99 F.3d 1439 (8th Cir. 1996).

The Supreme Court subsequently granted the State's petition for a writ of certiorari. South Dakota v. Yankton Sioux Tribe, 520 U.S. 1263 (1997). The Supreme Court reversed this Court, holding that the Reservation had been diminished by lands ceded to the United States in the 1894 Act, and remanded the case to the district court

for further proceedings. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998).

In March 1998, the Tribe commenced a separate civil action relating to criminal jurisdiction. See 98-CR 1, 7-14 (complaint, civil cover sheet, returns of service). Named as defendants were state and county officials, including the governor, the state attorney general and the elected county prosecutor of Charles Mix County ("the County"). 98-CR 1. After the new action was consolidated with the remanded Yankton Sioux case, the district court granted the United States' motion to intervene, and the defendants filed counterclaims. 98-CR 17, 29, 31, 63.

The district court held an evidentiary hearing on May 20, 1998, and heard oral argument. 98-CR 75, 112. The district court issued a memorandum opinion and order along with its judgment on August 14, 1998, finding in favor of the Tribe and the United States. 98-CR 116-117.

The defendants appealed, and this Court affirmed in part, reversed in part and remanded the case in an opinion issued on August 31, 1999. Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999). All parties sought rehearing by the panel or rehearing en banc, but the petitions were denied on December 8, 1999. Petitions for certiorari filed by the State and the Tribe were denied on June 26, 2000. South Dakota v. Yankton Sioux Tribe, 530 U.S. 1261 (2000).

During the course of the subsequent remand proceeding, the State and County moved for permission to take an interlocutory appeal of an Order concerning the scope of the remand. 98-CR 229, 233-234. After the district court denied the motions, the State and County petitioned this Court for a writ of mandamus. USA at 55, 58. The petitions were denied on June 6, 2007, and the district court held a court trial on November 13-14, 2007. 98-CR 276-278, 411. It issued its decision in a memorandum opinion and order on December 19, 2007, and entered judgment the same day. 98-CR. 427, 429.

The defendants (officials of the State of South Dakota and of Charles Mix County, South Dakota) filed a single notice of appeal on February 13, 2008. 98-CR 433.[2] The Tribe filed a notice of appeal on February 15, 2008, which is consolidated with the defendants' appeal.

On May 15, 2008, the State petitioned this Court for an initial hearing en banc. USA at 1. The petition was denied on July 9, 2008. USA at 19.

[2] The Notice of Appeal also lists Southern Missouri as an appellant. However, Southern Missouri did not participate in most of the remand proceedings and did not appear at the remand trial although the district court observed its attorney present among the members of the courtroom audience. See 98-CR 433.

STATEMENT OF THE FACTS

1. Background.

In 1858, the Yankton Sioux Tribe executed a treaty with the United States in which it yielded its claim to "more than 11 million acres of . . . aboriginal lands in the north-central plains." Yankton Sioux, 522 U.S. at 334. The 1858 Treaty left the Tribe with a reservation comprised of approximately 430,000 acres located in what is now Charles Mix County, South Dakota. Id.

With the enactment of the Dawes Act in 1887, the Government sought to open reservation lands to non-Indian settlement and to encourage Indian private ownership. Id. at 335. The result was a federal policy of allotting reservation lands to individual Indians, purchasing the surplus land from the tribes and opening the ceded land to non-Indian settlers. See id. at 335-336; Gaffey, 188 F.3d at 1016.

In the case of the Yankton Sioux Tribe, the allotment period began with each member receiving a 160-acre allotment from the existing Reservation. Yankton Sioux, 522 U.S. at 336; Gaffey, 188 F.3d at 1016. Although many of the allotments were concentrated along the Missouri River, others were scattered throughout the Reservation. Yankton Sioux, 522 U.S. at 336.

The Tribe ceded approximately 168,000 acres of the Reservation to the United States in an 1892 agreement which was ultimately ratified by Congress in 1894. Act

of Aug. 15, 1894, 28 Stat. 286, 314-19 ("the 1894 Act"). Article VIII of the 1894 Act specifically reserved from sale to non-Indian settlers roughly 1,250 acres of the unallotted lands ceded by the Tribe to the United States, which were the lands "as may now be occupied by the United States for agency, schools, and other purposes." See 28 Stat. 316; USA at 20 (Ex. 205 – listing reserved land totaling 1,253.76 acres). This land is often referred to as the "reserved land" or "agency land" and most of it was returned to the Tribe by the Act of February 13, 1929. 45 Stat. 1167.

2. The initial lawsuit.

The Tribe's original 1994 lawsuit sought to establish its civil jurisdiction over a proposed waste site on land it had ceded to the United States under the provisions of the 1894 Act. Yankton Sioux, 522 U.S. at 340-342. The Tribe argued that the land remained Indian country because it was contained within the Reservation's original 1858 exterior boundaries. 94-CR 1. The Supreme Court ultimately held that the Reservation had been diminished by lands ceded to the United States in the 1894 Act. See Yankton Sioux, 522 U.S. at 358. As a result, the 168,000 acres of ceded lands "no longer constitute Indian country," but rather are subject to the primary jurisdiction of the State. Id.

3. Consolidation after remand from the Supreme Court.

The focus of the litigation shifted to the exercise of criminal jurisdiction after the Yankton Sioux case was remanded and consolidated with the 1998 action by the Tribe. 98-CR 1, 17. In the new action, the Tribe sought a declaratory judgment defining the present-day Yankton Sioux Reservation as all lands within the original 1858 Reservation boundaries that were not ceded by the 1894 Act. 98-CR 1. These lands, the Tribe argued, were subject to the exercise of tribal and federal jurisdiction. 98-CR 1. The Tribe also sought injunctive relief precluding the State from exercising criminal jurisdiction over tribal members "within the boundaries of the Yankton Sioux Indian Reservation . . . ." 98-CR 1. The United States intervened in the action, arguing in favor of the Tribe's position and seeking declaratory relief defining the Reservation as all non-ceded land remaining within the1858 boundaries. 98-CR 38.

The State counterclaimed, arguing that the Reservation had been disestablished. 98-CR 79. It sought a declaratory judgment that: (a) all lands within the 1858 boundaries have lost their reservation and Indian country status under 18 U.S.C. § 1151(a); and (b) the original allotted lands within the 1858 boundaries to which Indian title has been extinguished have lost their status as Indian country and allotted lands under 18 U.S.C. § 1151(c), and are subject to State jurisdiction for civil and criminal purposes. 98-CR 79.

The district court held that the Reservation had not been disestablished. Yankton Sioux Tribe v. Gaffey, 14 F. Supp. 2d 1135, 1137 (D.S.D. 1998). It also determined that the 1858 treaty boundaries remained intact and that the Reservation included: (1) lands that were allotted; and (2) land reserved from sale in the 1894 Act for agency, school, and other tribal purposes. Id. at 1159.

4. This Court's decision in Gaffey.

In Gaffey, this Court affirmed in part and reversed in part, and remanded for further proceedings. Gaffey, 188 F.3d at 1013. This Court affirmed that the Yankton Sioux Reservation had not been disestablished. Id. It also affirmed the district court's ruling that "land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a)." Id. at 1030.

This Court concluded, however, that the text of the 1894 Act, and the contemporaneous understanding of it, establish that the original 1858 Reservation, diminished by ceded lands, was "further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." Id. The Court also concluded that "the original exterior boundaries have not been maintained" and "do not serve to separate Indian country from areas under primary State jurisdiction." Id. at 1021, 1030. It did not determine the Reservation boundaries, the specific status of trust lands under 18 U.S.C. §§ 1151(a) or (c), or the status of fee

lands owned by individual Indians or the Tribe. Id. at 1030. Rather, it remanded the case to allow the district court to conduct further proceedings consistent with the opinion. Id. at 1031.

Both the Tribe and the State petitioned the Supreme Court for a writ of certiorari. The State sought review of this Court's determination that the Reservation had not been disestablished. The Tribe sought review of the holding that the sale of formerly allotted lands to non-Indians effected further incremental diminishment. See USA at 23-24 (Government response to cert. petitions, describing questions presented).

The Government opposed both petitions. USA at 35-54. Although it agreed with the Tribe's argument that this Court had erred regarding incremental diminishment, the Government suggested the petitions were premature. USA at 48. The Government argued that review might be appropriate after the conclusion of the remand proceedings which were specifically intended to resolve the question of how much land remained a part of the Reservation. USA at 35-36, 48, 54. The petitions for certiorari were denied. South Dakota v. Yankton Sioux Tribe, 530 U.S. 1261 (2000).

5. The district court's order identifying the issues it would consider on remand.

After this Court issued its mandate in Gaffey, the parties filed briefs in the district court regarding what issues were within the scope of the remand. See 98-CR 189, 190, 194, 197, 198, 200, 203. The Tribe argued that the boundaries of the Reservation had been frozen either with the enactment of 25 U.S.C. § 398d ("the 1927 Act") or the Indian Reorganization Act of 1934 ("IRA").[3] 98-CR 190 at 4-11. Under this view, allotted land sold to non -Indians after the Reservation boundaries had been frozen would no longer cause an incremental diminishment of the Reservation. 98-CR 190 at 4-11.

The State argued that Gaffey had decided all issues of fee land in favor of primary state jurisdiction, leaving only issues associated with trust land status for remand. 98-CR 194 at 7-9; 98-CR 200 at 6-7. The United States disputed the State's claim in this regard since there had been no binding judicial determination by a superior court regarding the status of allotted lands now owned in fee by the Tribe or by individual Indians. See Gaffey 188 F.3d at 1030; see also 98-CR 190 at 4-11, 98-CR 203 at 3-4. Indeed, this Court expressly stated that Indian-owned fee land could be within the boundaries of the Reservation. Id. Accordingly, the United States did

[3] 25 U.S.C. § 461, et seq.

not agree that only lands now held in trust can constitute part of the Reservation. 98-CR 189 at 5-6.

The United States asserted that, on remand, the district court should address: (1) which trust lands, in addition "to the land reserved to the federal government in the 1894 Act and then returned to the Tribe," Gaffey, 188 F.3d at 1030, constitute part of the Yankton Sioux Reservation; (2) which trust lands, even if not Reservation land, are Indian country under § 1151(c); and (3) whether former allotted lands, now owned in fee by Indians and which have never been transferred out of Indian ownership, are part of the Reservation. See 98-CR 190 at 4-11.

On December 13, 2006, the district court issued an order describing the issues it would consider and directing the parties to prepare maps to assist in determining the boundaries of the diminished Reservation. 98-CR 223. The district court indicated it would consider whether any land owned in fee by Indians is included within the Reservation since the Gaffey Court had not decided the issue. 98-CR 223 at 2-3. The district court also stated that it must determine the Reservation's boundaries and, to that end, it would allow argument concerning the Tribe's frozen boundary theories. 98-CR 223.

6. The mandamus petitions.

After unsuccessful efforts to obtain the district court's certification for an interlocutory appeal, the State and County filed petitions for writs of mandamus which were later consolidated. USA at 55, 85 (petitions); see also 98-CR 248 (order denying motion for interlocutory appeal); 98-CR 257 (Eighth Circuit clerk letter consolidating petitions). The petitions sought a narrow interpretation of this Court's mandate following Gaffey in an effort to prevent the litigation of certain issues, such as the Tribe's frozen boundary claims. In this regard, the State invoked the law of the case and the related mandate rule to support its argument that the district court was only allowed to consider the status of allotted trust land and land taken into trust under the IRA. USA at 55-58. The status of the reserved land as reservation land, the State acknowledged, was not open to debate on remand:

> The Order should further declare that there is no "reservation" within the 1858 boundaries except the area returned by the Federal Government to the Tribe in 1929 as identified at 188 F.3d at 1030 . . . in addition to such lands as may be found to be "reservation" as set forth above.

USA at 83-84.

The United States and the Tribe opposed the mandamus petitions, and the district court filed its own response. See USA at 92 (district court response). The Government argued the State and County had failed to satisfy the stringent standard

necessary to support the issuance of an extraordinary writ and, further, any claims the district court had strayed from the scope of the mandate could be litigated in a direct appeal. USA at 117. The district court's response noted the binding effect of the Gaffey decision and this Court's statement that the record was incomplete. USA at 92-93. The district court explained that its duty was to determine reservation boundaries, but not to determine property title. USA at 95. This Court denied the mandamus petitions on June 6, 2007.[4] 98-CR 276-278.

7. The evidence at the remand trial.

Despite its efforts to seek mandamus relief to narrow the Gaffey mandate, the State's legal positions at the remand trial directly contradicted two of Gaffey's holdings. First, in its pretrial brief to the district court, the State claimed ". . .there are no 'reservation' boundaries . . . because the reservation has been disestablished . . ." 98-CR 338 at 1. The State's brief selectively applied the holdings of Yankton Sioux and Gaffey to fence out its familiar disestablishment argument based upon the Supreme Court's holding in DeCoteau v. District County Court, 420 U.S. 425

[4] The denial of its mandamus petition ultimately allowed the district court to determine that the IRA, at least theoretically, prohibited certain land transfers. However, in this appeal, the State has not repeated its claim that the district court's consideration of the issue exceeded the scope of the mandate.

(1975) – an argument thoroughly considered and rejected in Gaffey. Gaffey, 188 F.3d at 1019-1020.

Second, the State refused to abide by this Court's holding that land reserved under the 1894 Act for agency and other purposes constituted part of the diminished reservation. Although the State noted its disagreement with Gaffey's reserved land holding, the State offered little more than a legal critique of the ruling. Absent was any evidence at trial supporting its view that the land could not be considered reservation land under § 1151(a). Also missing was any attempt to invoke an exception to the law of the case doctrine.

The United States focused its efforts on remand upon developing the record concerning the land held in trust. See, e.g., 98-CR 279, 293 (status reports regarding ongoing effort to locate all trust tracts); MH 9-14; Gaffey at 1030. To this end, the Government introduced evidence at the remand trial concerning the location, acreage and classification of the 545 trust tracts located within the original 1858 Reservation boundaries – all of which, it contended, were part of the post-Gaffey diminished Reservation. See 98-CR 346 at 3-18; USA at 175-197 (listing all trust tracts). The trust lands were divided as follows:

	Category	Acreage
1)	Reserved land returned to tribal control (Exhibits 201, 201(a)-(j)) ;	913.83
2)	Land taken into trust after 1934 (Exhibits 202, 202(a)-(www);	6,444.47
3)	Land taken into trust before 1934 or non-reserve secretarial order land (Exhibits 203, 203(a)-(g);	174.57
4)	Allotted trust land taken into trust for the Tribe (Exhibits 204, 204(a)-(zzz); and	4,496.58
5)	Individual Indian Allotted trust land always held in trust (Exhibit 211)	25,555.08
	Total acreage	37,584.53

Each trust land category had its own legal analysis supporting a conclusion of reservation status. For example, the reserved land had been identified as § 1151(a) reservation land by the Gaffey Court, the allotted lands were untouched by any Congressional intent to diminish, and the land taken into trust by the Secretary of the Interior was lawfully added to the existing Reservation. 98-CR 346 at 3-18.

The Tribe argued that 25 U.S.C. 398d, or the "1927 Act," froze the boundaries of the Yankton Sioux Reservation as of 1927. The Tribe further argued that even if the 1927 Act did not freeze the boundaries of the Yankton Sioux Reservation, the boundaries were frozen by 25 U.S.C. §§ 462 and 464, or the 1934 Act.

8. The district court's opinion.

The district court recognized that the "inescapable result" of the prior appellate decisions was a checkerboard reservation. Yankton Sioux Tribe v. Podhradsky, 529 F. Supp. 2d 1040, 1048 (2007). Nevertheless, using the detailed information regarding the various tracts of trust land, the district court evaluated each distinct category of land and concluded that all of the trust land remaining within the original 1858 boundaries constituted Indian country under § 1151(a).

Recognizing the definitive holdings of Gaffey, 188 F.3d at 1030, the district court first acknowledged that land reserved for agency and other purposes under the 1894 Act was part of the remaining Reservation. Podhradsky, 529 F. Supp. 2d at 1052. It then identified the location and acreage of these parcels as part of the Reservation.

The district court further recognized this Court's ruling in Gaffey that "if originally allotted land passed out of Indian hands at any time after it was allotted, it was not part of the Yankton Sioux Reservation." Id. (citing Gaffey, 188 F.3d at 1030). The district court then determined that allotted tracts which had never passed in fee to non-Indians continued to be part of the Reservation, relying upon the overarching principle that land set aside as an Indian reservation "retains that status until Congress explicitly indicates otherwise[.]" Id. at 1052-1053 (quoting Solem v.

Bartlett, 465 U.S. 463, 469 (1984)). Since these lands were originally set aside in 1858 as part of the Yankton Sioux Reservation, and there was no explicit Congressional intent to alter the Reservation with respect to such parcels, their status as Reservation lands has never changed. Id.

Land taken into trust under the IRA required a different analysis. All of this land was within the 1858 Reservation boundaries. Because the Secretary has authority to add land to an existing reservation under the IRA, see 25 U.S.C. § 465, the district court rejected the State's argument that the IRA land could constitute Indian country under § 1151(a) only if it had been formally proclaimed to be a new reservation pursuant to 25 U.S.C. § 467. Podhradsky, 529 F. Supp. 2d at 1053. The district court also rejected the State's claim that certain parcels were not validly in trust. Id. at 1045. Applying the unambiguous text of the Quiet Title Act (QTA),[5] the district court concluded the Government had not waived its sovereign immunity for any such claims, and they were, therefore, unsupported by federal subject matter jurisdiction.[6] Id.

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[5] 28 U.S.C. § 2409a.

[6] The district court also held that it was not necessary to demonstrate formal acceptance for lands the Department of the Interior undisputedly considered to be trust lands. TT 143-144.

In addition, the district court provided alternative holdings regarding the status of the trust land within the original 1858 Reservation boundaries. Applying well-established holdings of the Supreme Court and this Court, the district court determined that the trust land identified in the Government's trial exhibits constituted, at a minimum, an informal or de facto reservation for purposes of jurisdiction under 18 U.S.C. § 1151(a). Id. at 1054-1056. The Court cited the United States' unequivocal efforts to set aside the trust land for the use and benefit of Indians as well as the Government's concomitant superintendence over the land. Id. at 1055-1056. The Court noted, in this regard, that the United States exercises exclusive federal jurisdiction over this land as Indian country, and does not distinguish between land taken into trust under the IRA, land reserved by the United States but later returned to the Tribe, and allotted land still held in trust. Id. Moreover, the BIA extends federal services to the trust parcels. See id.

Included among these services are the efforts of the BIA's realty professionals. The BIA keeps and maintains extensive title records and documents relating to the trust parcels located within the Reservation. In fact, BIA employees trained in interpreting real estate records and in cartography constructed a spreadsheet of all trust parcels within the 1858 Reservation boundaries and a corresponding map. See USA at 175; Ex. 210. In addition, the BIA maintains an agency on the Reservation, and the

local realty officer is intimately involved in leasing trust land, most of which is used for agricultural purposes. TT 203-207; see, e.g., USA at 121(Ex. 202(a)) (agricultural lease for trust tract #2008, comprised of 551.72 acres). Ultimately, the superintendent of the agency must approve all leases for trust land. TT 206. The Department of the Interior also collects rents paid on the trust land. TT 206. The State introduced no evidence to dispute the preeminence of federal superintendence over the trust land located within the Reservation's 1858 boundaries.

The district court also concluded that the Government set-aside and superintendence would, at a minimum, qualify the trust land located within the 1858 boundaries as a dependent Indian community under 18 U.S.C. § 1151(b). Id. at 1057. The analysis, the district court recognized, is essentially the same as the inquiry for informal reservation status and would qualify the land as Indian country under § 1151(b) if for some reason the land did not constitute at least an informal or de facto Reservation under § 1151(a).[7] Id.

The district court determined that "previously allotted land, which is now owned in fee and has been continuously owned by an Indian, retains its reservation

[7] The Charles Mix County State's Attorney testified that there were only three, or possibly four, distinct areas which he considered to be dependent Indian communities – two in Wagner, one south of Lake Andes and an area near Marty. TT 62. However, the conclusion was unsupported by any analysis or authority. TT 66.

status and it is Indian country under 18 U.S.C. § 1151(a)." Podhradsky, 529 F. Supp. 2d at 1056. This category of fee land was outside the scope of this Court's holding in Gaffey which found diminishment of allotted lands only when it passed in fee to a non-Indian. Id. The district court acknowledged that it was unclear, as a factual matter, whether there is any fee land that has been held continuously in Indian ownership since its allotment. Id. at 1056-1057 The court further concluded: "Although the record was not fully developed regarding Indian-owned fee land, the Court finds it sufficient for purposes of this remand proceeding to define that category of land as reservation, which is subject to federal criminal jurisdiction under 18 U.S.C. § 1151(a)." Id. at 1056.

Finally, the district court considered the Tribe's argument raised before trial that the boundaries of the Reservation were frozen by either the operation of the 1927 Act or the IRA. The district court rejected the former claim, concluding the 1927 Act applied only to reservations created by Executive order. Id. at 1048-1050. However, the district court found that the IRA could have prevented fee patenting of trust land at least until the enactment of the Supervised Sales Act of 1948.[8] Id. at 1050-1051. The determination was tempered by the court's observation that the record did not contain sufficient information to determine any such effect. Id. at 1051.

[8] 25 U.S.C. § 483.

SUMMARY OF THE ARGUMENT

The district court faithfully followed this Court's mandate and committed no reversible error. First, applying the law of the Gaffey case, the district court determined the location and acreage of land reserved under the 1894 Act for agency and other purposes and later returned to Tribal control. Including this land as part of the diminished Yankton Sioux Reservation was the only result permitted by the mandate.

Second, inclusion of allotted trust land as part of the Reservation was proper and well supported. The allotted land was part of the 430,000 acres originally set aside in 1858 for the Yankton Sioux Reservation and was not ceded to the United States in the 1892 agreement. There is no evidence of a Congressional intent in the 1894 Act to divest the allotted land of its Reservation status while in Indian hands.

Third, land taken into trust under the IRA is also Indian country under 18 U.S.C. § 1151(a). The IRA was enacted, in part, to stabilize the nation's tribal land base which had been devastated during the allotment era. Toward this end, the IRA authorizes the Secretary of the Interior to add land to an existing reservation by taking the land into trust. See 25 U.S.C. §§ 465, 467.

Fourth, at a minimum, the trust land constitutes an informal or de facto reservation. The land was set aside for the exclusive use of the Tribe or its members,

and the Government exercises superintendence over the land. Under the circumstances, the trust land fits easily into the definition of an informal reservation as described by the Supreme Court. The same essential analysis supports the district court's alternative holding that the trust land constitutes a dependent Indian community.

The district court correctly rejected the Tribe's argument that the 1927 Act froze the boundary of the Yankton Sioux Reservation. The 1927 Act could not have frozen the Reservation's boundaries since they were created by treaty, and the 1927 Act applies only to reservations created by Executive order. In addition, the district court's ruling on the Tribe's 1934 Act frozen boundary argument provides no grounds for reversal. Consistent with Gaffey, the district court ruled: (1) that the 1934 Act effectively froze the boundaries of the Reservation because it prohibited the sale or transfer of restricted Indian land; and (2) that further diminishment of the Reservation again occurred beginning in 1948, after Congress enacted the Supervised Sales Act, 25 U.S.C. § 483, which lifted restrictions of the 1934 Act and allowed the Secretary of the Interior to grant patents in fee to Indian owners upon application. Podhradsky, 529 F. Supp. 2d at 1050-1051.[9]

[9] Although the district court's ruling that the Reservation was again diminished after passage of the 1948 Act is consistent with this Court's ruling in Gaffey, the (continued...)

For its part, the State's appellate arguments have little to do with alleging discrete district court errors during the remand proceeding and focus, instead, upon topics which are not subject to review at this stage of the appeal. The law of the case doctrine precludes a three-judge panel, which will consider this appeal in the first instance, from considering the State's claim that the Reservation has been disestablished and its related claim that the reserved lands cannot be Indian country under § 1151(a). Further, the State's efforts on appeal to avoid the application of the law of the case doctrine have been waived since the State never claimed an exception to the doctrine during the post-Gaffey remand.[10]

The State's bid to reduce the acreage amount of IRA trust land – on the basis that the trust lands allegedly were not formally accepted by the Secretary of the Interior – is another example of appellate misdirection. The State disregards the

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[9](...continued)
United States continues to believe that the Gaffey ruling was in error in holding that there is clear and plain congressional intent to diminish the Reservation beyond the loss of the ceded unallotted lands, opened for sale pursuant to the 1894 Act. In the United States' view, the boundaries were fixed at that stage, and, at the appropriate time, the United States may seek en banc or Supreme Court review of that issue.

[10] The County's brief is almost entirely devoted to commentary upon previous arguments against disestablishment made by the United States prior to this remand proceeding. The United States disagrees with the County's commentary, but since the disestablishment issue was not before the district court and is not currently before this Court, the United States will not respond further to the County's assertions in this brief.

district court's threshold determination that it lacked federal subject matter jurisdiction under the Quiet Title Act to even consider the claim. In addition, the record establishes that the United States, the State and the County have all recognized the land as trust land.

When these issues are pared, only a few principal claims remain, such as the argument that the land taken into trust after 1934 cannot be part of the Reservation because it was never formally "re-proclaimed" as a reservation under 25 U.S.C. § 467. However, the IRA does not require the Secretary to proclaim land as a reservation where the reservation already exists. Instead, the Secretary may take land into trust and add it to the existing reservation, all pursuant to detailed procedures set out in regulations implementing the IRA. The State's philosophical disagreement with the IRA and with the Secretary's authority to accept land into trust implicate an issue of public policy – not an error in the district court's ruling.

The positions of the United States that are included in this brief are limited to issues presented in the remand proceeding following Gaffey. The United States continues to adhere to the arguments set forth in its post-Gaffey Petition for Rehearing/Rehearing En Banc which preserved those claims for possible further review (by the en banc Court or by the Supreme Court) after resolution of the issues remanded in Gaffey. But the issues set forth in the United States post-Gaffey Petition

for Rehearing/Rehearing En Banc, like the two issues that were already decided in the Gaffey decision that the State seeks to raise in its opening brief, are not properly before the three-judge panel in this appeal.

ARGUMENT

I.

THE POST-GAFFEY YANKTON SIOUX RESERVATION INCLUDES ALL TRUST LAND WITHIN THE RESERVATION'S ORIGINAL 1858 TREATY BOUNDARIES.

A. Standard of review.

When a district court conducts a bench trial, this court reviews the district court's findings of fact for clear error and its legal conclusions and mixed questions of law and fact de novo. Eckert v. Titan Tire Corp., 514 F.3d 801, 804 (8th Cir. 2008). In addition, "[u]nder the law of the case doctrine, a district court must follow [this Court's] mandate, and [this Court] retain[s] the authority to decide whether the district court scrupulously and fully carried out [the] mandate's terms." United States v. Bartsh, 69 F.3d 864, 866 (8th Cir. 1995) (quoting Jaramillo v. Burkhart, 59 F.3d 78, 80 (8th Cir. 1995)).

B. The application of the Gaffey mandate requires that land reserved under the 1894 Act be considered Indian country under 18 U .S.C. § 1151(a) and part of the diminished Yankton Sioux Reservation.

In one of three definitive holdings in its Gaffey opinion, this Court held "that the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under § 1151(a)[.]" Gaffey, 188 F.3d at 1030. Reserving the land, this Court reasoned, provided evidence of an intent to retain the Reservation after the execution of the 1892 surplus land agreement – an intent confirmed in 1929 with Congress' decision to return the reserved land to the Yankton Sioux Tribe. See Gaffey, 188 F.3d at 1027-1029. The district court had reached a similar conclusion prior to appellate review in Gaffey. See Gaffey, 14 F. Supp. 2d at 1154, 1160 (Article of VIII of the 1894 Act suggests a continuing reservation which includes land reserved for agency and other purposes).

In the remand proceeding after Gaffey, the district court simply applied this Court's reserved land holding and determined precisely which land originally reserved and later returned to the Tribe was reservation under the provisions of § 1151(a). In this regard, Exhibit 205 contains three pages dating back to August 27, 1894. See USA at 20 (Ex. 205). These documents are maintained as part of the original allotment book at the BIA's Yankton Agency and list the location and acreage of each parcel reserved under the 1894 Act. TT 203-204. Exhibit 201, in turn, contains a list of the tracts detailed in Exhibit 205 which are currently held by the Tribe in trust. USA at 120. These exhibits indicate that 913.83 of the 1,253.76 acres originally

reserved have been returned to tribal control and are currently held in trust. USA at 20, 120. In determining that these specific parcels were Indian country under § 1151(a), the district court properly applied the holding in Gaffey.

The State does not allege the district court erred by following the Gaffey mandate. Instead, it offers a critique of this Court's reserved land holding and seeks another opportunity for review, relying upon information and arguments already presented to and rejected by the Court in Gaffey. Those issues are not properly before this Court now. The State's argument contravenes the law of the case doctrine which obligates courts and parties in subsequent proceedings to abide by an earlier appellate decision.[11]

The Gaffey reserved land holding also requires a finding of reservation status for two tracts of reserved land that were previously held by the Chapter of Calvary Cathedral Episcopal Church. The two tracts total 126 acres (of the 913.83 acres in trust) and were undisputedly among the parcels reserved under Article VIII of the 1894 Act. Ex.'s 201, 201(c)-(d). They were conveyed to the Church in 1897 and in 1920, and then deeded in trust to the Government for the benefit of the Tribe in 1944. Ex. 201(c)-(d). According to the State, the land cannot constitute part of the

[11] The law of the case doctrine and the State's effort to skirt its application are discussed in greater detail in Sections IV and V of this brief.

Reservation because these parcels were not returned by the federal government to the Tribe under the 1929 Act, which only applied to "lands now reserved for agency, schools or other purposes." State's Brief at 65 (quoting 45 Stat. 1167 (1929).

Even if that argument is not foreclosed by the Court's ruling in Gaffey, it lacks merit. The State's argument is incorrectly premised upon the belief that the 1929 Act created the modern-day Reservation. In truth, the Reservation has existed continuously since its creation in 1858 as this Court held in Gaffey. Gaffey, 188 F.3d at 1022. The fact that Congress reserved lands under Article VIII of the 1894 Act demonstrated an intent to continue the Reservation and include those lands within it. The passage of the 1929 Act simply confirmed these conclusions for the Gaffey Court:

> [T]he return of these lands to tribal control suggests that the reserved lands were always intended to provide a property site for organized efforts to provide aid and education to tribal members so long as they were needed.

Id. at 1029.

Furthermore, the fact that two parcels of reserved land were conveyed by fee patent to the Church does not change the analysis since it certainly could not change the Congressional intent expressed years earlier. What is important is that the two fee patented parcels were never allotted and never opened to non-Indian settlement, so they never lost their status as reserved lands. Instead, they remained with the

Church – a use contemplated under the provisions of Article VIII. See Ex. 205. Moreover, these fee transfers involved land within an existing reservation and, hence, the property never lost its reservation status. 18 U.S.C. § 1151(a). Equally important is the fact the two tracts were restored to Tribal control and continue to be held in trust by the United States.[12]

C. Land from the original Yankton Sioux Reservation which was allotted to tribal members and has been held continuously in trust remains part of the diminished Yankton Sioux Reservation and constitutes Indian country under 18 U.S.C. § 1151(a).

"After land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise." Gaffey, 188 F.3d at 1021 (citing Solem, 465 U.S. at 469). Congressional intent, in this regard, must be "clear and plain" and "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Id. (citing United States v. Dion, 476 U.S. 734, 738 (1986), and Mattz v. Arnett, 412 U.S. 481, 505 (1973)).

The Yankton Sioux Indian Reservation was established by treaty in 1858, and it has not been disestablished. Gaffey, 188 F.3d at 1028. Furthermore, two rounds of appellate litigation aimed specifically at divining Congressional intent at the time

[12] Whether these tracts were taken into trust under the authority of the 1929 Act or pursuant to the provisions of the IRA is not legally significant since the IRA allows the Secretary to add to existing Reservations by taking land into trust. 25 U.S.C. §§ 465, 467.

of the 1894 Act have failed to reveal any intent to separate the allotted trust lands from the Reservation.[13] These trust parcels are part of the same land which was originally set aside as a Reservation in 1858 and, in the absence of any contrary and express Congressional intent, their Reservation status remains unchanged.

The State does not point to evidence of a specific intent to diminish the Reservation by the allotted lands remaining in trust. Instead, it reasons by negative implication that the allotted trust land cannot be Indian country under § 1151(a) because, under Gaffey, the formerly allotted land which passed in fee to non-Indians lost reservation status despite § 1151(a)'s provision that land within the limits of a reservation is Indian country "notwithstanding the issuance of any patent." See State's Brief at 53 (quoting 18 U.S.C. § 1151(a)).

However, the State's argument incorrectly elevates § 1151(a) to the sole authority for determining whether the allotted land is part of the Reservation and overlooks the well-established need for clear and plain Congressional intent in order for allotted lands to lose reservation status. Furthermore, nothing in this Court's diminishment holding in Gaffey precludes a finding that the allotted land remains part

[13] There is no legal distinction between allotted land still held in trust for the descendants of the original allottee and allotted land which passed to the Tribe without losing its trust status. United States v. Stands, 105 F.3d 1565, 1573 n.5 (8th Cir. 1997) (citing 18 U.S.C. § 1151(c)).

of the Reservation. Under this Court's prior analysis, some formerly allotted lands lost reservation status, not because of the issuance of fee patents, but because Congress intended to separate from the Reservation allotted lands that were purchased by non-Indian settlers. Indeed, this distinction plays a central role in the district court's determination that formerly allotted land which has passed to fee but is still held by Indians continues to be part of the Reservation in the absence of any Congressional intent to the contrary. See Podhradsky, 529 F. Supp. 2d 1040;[14] see also Yankton Sioux, 522 U.S. at 356 (the Supreme Court has "repeatedly held that not every surplus land Act diminished the affected reservation[]" even though every surplus land act "necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation[.]").

In addition, the State's claim that allotted lands are Indian country under § 1151(c), but not under § 1151(a), when such allotments are located outside of the new boundaries of a diminished reservation, or where no reservation exists, adds little to the analysis in this case. Here, the allotted trust lands were part of the 1858 Treaty

[14] The district court's conclusion in this regard was not erroneous. The only argument offered by the State to the contrary rests upon the Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 526-527 (1998). However, Venetie involved fee land for which Congress had expressly revoked reservation status. Here, there simply has been no express Congressional intent.

Reservation which has never been disestablished. For purposes of jurisdiction, the diminished Yankton Sioux Reservation features a checkerboard configuration and, as such, does not have a continuous exterior boundary. This fact serves as the principal distinction between this Reservation and the Rosebud Sioux Reservation which was diminished but retained a continuous exterior boundary. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (interpreting three unilateral Congressional acts to find diminishment in certain discrete areas of the Rosebud Reservation). Accordingly, no parcel within the former 1858 Yankton Reservation boundaries is outside of the new boundaries in the same way that trust land is outside the diminished Rosebud Reservation.[15]

In addition, it appears the Gaffey panel was keenly aware of the effect its determination of the disestablishment issue would have on allotted trust land:

> If a reservation exists, the Tribe maintains jurisdiction over all land within its limits, § 1151(a), but if there is no reservation, the State has primary jurisdiction over all land except allotments which continue to be held in trust, § 1151(c)[.]

Gaffey, 188 F.3d at 1017 (footnote and citations omitted). This Court's decision that the Reservation was not disestablished effectively resolves the status of the allotted

[15] The State suggests that the absence of a contiguous exterior boundary precludes a determination that a reservation exists. However, it cites no authority for that proposition – only examples where Congressional intent in particular diminishment cases has produced a new exterior boundary.

land – since the Reservation exists and the allotted land that has remained in Indian ownership has always been part of the Reservation, it is Indian country under § 1151(a).

Finally, the State suggests the classification of the allotted land as Indian country under either §§ 1151(a) or (c) is not particularly important since both will support federal criminal jurisdiction. Leaving aside the fact that the same argument counsels just as easily against the State's efforts to strip the land from the Reservation, the Yankton Sioux Tribe can hardly be faulted for seeking to preserve what remains of the Reservation which was set aside for its members over 30 years before South Dakota officially joined the Union.

D. Land taken into trust under the provisions of the IRA and added to the existing Yankton Sioux Reservation is Indian country under 18 U.S.C. § 1151(a).

The enactment of the IRA marked the formal end of the federal government's allotment policy and the beginning of its effort to "stabilize the tribal land base." Nichols v. Rysavy, 809 F.2d 1317, 1323 (8th Cir. 1987).[16] Among other things, the IRA allows "surplus-opened Indian lands to be restored to tribal ownership." Hagen v. Utah, 510 U.S. 399, 425 (1994); see also Solem, 465 U.S. at 467 n.8 (the IRA

[16] Approximately 90 million acres, or roughly two-thirds of all land held by Indian tribes in 1887, was alienated through allotment. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 436 n.1 (1989) (citing F. Cohen, Handbook of Federal Indian Law (1982) at 614).

authorizes the return of opened lands "to reservation status."). In this regard, the Act vests the Secretary of the Interior with the authority to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465.

The Supreme Court has recognized that "Section 465 provides the proper avenue for [an Indian tribe] to reestablish sovereignty over territory" it previously held. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005). Indeed, regulations promulgated pursuant to the IRA characterize tribal efforts to regain land within original reservation boundaries as "[o]n-reservation acquisitions." 25 C.F.R. § 151.10. This is consistent with the regulatory definition of a reservation which includes the area of land bounded by previous borders "where there has been a final judicial determination that a reservation has been . . . diminished. . ." 25 C.F.R. § 151.2.

In addition, the Supreme Court has observed that the regulations implementing § 465 "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." Sherrill, 544 U.S. at 220-221; see also 25 C.F.R. § 151.10). These regulations specifically require the Secretary to consider a number of factors before taking land into trust including "[j]urisdictional problems and potential conflicts of land use which may arise." Id. at 221 (citing 25 C.F.R. § 151.10).

Civil and criminal jurisdiction are generally conterminous in Indian country. Accordingly, although 18 U.S.C. § 1151 addresses federal criminal jurisdiction under the Indian Country Crimes Act[17] and the Indian Major Crimes Act,[18] it also "generally applies to questions of civil jurisdiction" such as efforts to impose state taxes on Indian land. Venetie, 522 U.S. at 526-527 (citing DeCoteau, 420 U.S. at 427 n.2).

In this regard, land taken into trust under the provisions of the IRA is "exempt from State and local taxation." 25 U.S.C. § 465. However, this Court has described § 465 as more than a simple tax exemption. Instead, it has characterized it as a broad proscription upon the exercise of state or local jurisdiction on land taken into trust:

> At the time [§] 465 was enacted, judicial decisions had established that lands held in trust by the United States for Indians were exempt from local taxation as federal instrumentalities . . . and that federal jurisdiction over tribal trust land was exclusive and precluded assertion of state or local control. . . . When Congress provided in [§] 465 for the legal condition in which land acquired for Indians would be held, it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.

Chase v. McMasters, 573 F.2d 1011, 464, 465 (8th Cir. 1978) (citations omitted).

In this case, the district court's determination that the diminished Reservation includes land taken into trust pursuant to the IRA fits easily within the foregoing

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[17] 18 U.S.C. § 1152.

[18] 18 U.S.C. § 1153.

principles. All of the land at issue is within the original 1858 Reservation boundaries and represents a return of former Yankton Sioux land to the Tribe's sovereign control.

The State claims that land can never again attain reservation status in the absence of an official proclamation pursuant to 25 U.S.C. § 467. However, the State's argument regarding the alleged need for a "proclamation" is based upon selected bits of legislative history that the State misapplies to the plain and unambiguous text of § 467 which, by its terms, applies exclusively to new, not existing, reservations:

> **§ 467. New Indian Reservations.**
>
> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 467.

Since § 465 provides the Secretary with the authority to take into trust land which does not correspond to an existing reservation, § 467 allows the Secretary to proclaim the land as a reservation. There is, of course, no need to proclaim a "new Indian reservation" for lands which are simply added to an existing reservation. The State's argument to the contrary rests upon no controlling caselaw, and its effort to support its claim with persuasive authority is wide of the mark. In fact, its reliance

upon the decision in Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007), is misplaced since the case actually illustrates an uncomplicated application of § 467 to a new reservation where none had existed previously. See also South Dakota v. U.S. Dep't of Interior, 487 F.3d 548, 553-554 (8th Cir. 2007) (describing Flandreau Santee Tribe's plans to have off-reservation trust tract proclaimed part of its reservation).

Because the Yankton Sioux Reservation has existed since its creation in 1858, there is no need to declare a new reservation each time a tract of land within its original boundaries is taken into trust. For this reason, the district court correctly concluded, "[i]t 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 1054; see also 25 C.F.R. § 151.2(f) (an existing reservation includes land encompassed in the former boundaries of a diminished reservation "as defined by the Secretary[]").

The State also argues that taking land into trust under § 465 cannot result in reservation land since the well-established Indian country requirements of federal set-aside or superintendence are not satisfied.[19] State's Brief at 37-38. Its principal

[19] The State appears to confound the concepts of "Indian country" and "reservation." Even if the lands at issue did not constitute reservation, they would be (continued...)

authority for this claim is the Supreme Court's decision in Venetie. However, the facts of Venetie bear little resemblance to those present in this case, and the decision is a poor candidate to support the State's ambitious argument.

In Venetie, the Supreme Court determined that land owned in unrestricted fee simple by corporations controlled by Alaska Natives could not be considered a dependent Indian community under 18 U.S.C. § 1151(b). The corporations acquired the land pursuant the provisions of the Alaska Native Claims Settlement Act (ANCSA) which sought to end federal supervision over Indian affairs in Alaska. In this regard, ANCSA expressly revoked all but one of the existing reservations by eliminating "the various reserves set aside . . . for Native use." Venetie, 522 U.S. at 533 (quoting 43 U.S.C. § 1618(a)). There was no restraint upon the fee land's alienation, and, although the land benefitted from modest protections under ANCSA, the federal government did not exercise jurisdiction and control over the land. Accordingly, the claim of Indian country was unsustainable since the federal government had unequivocally disavowed any efforts to set the land aside for the Natives' use and also because ANCSA was specifically enacted to end federal superintendence. Venetie, 522 U.S. at 523, 534.

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[19](...continued)
"Indian country." Lands acquired in trust are both set aside for the tribe and under federal supervision.

Simply put, Venetie is everything this case is not. It involved fee land owned by Indian corporations pursuant to a statute which revoked the existing reservation status and disclaimed federal superintendence. In contrast, this case involves trust land expressly set aside for the benefit of the Yankton Sioux Tribe pursuant to a statute which authorizes the addition of land to an existing Indian reservation. Furthermore, the district court used the same test used by the Supreme Court in Venetie to determine the question of Indian country – federal set-aside and superintendence – and correctly found sufficient evidence of Indian country. In fact, the State's claim that all of the existing trust land is treated with the same degree of superintendence as the reserved land supports the district court's determination that all of the trust lands satisfy the two essential components of Indian country. See infra Section V. B.

In the end, the State's most revealing argument is its claim that land taken into trust under § 465 gives rise to certain policy concerns. State's Brief at 44-48. However, this argument simply expresses the State's dissatisfaction with the IRA and the lawful regulatory method by which the Secretary takes land into trust. The contention adds nothing to the legal analysis in this appeal, fails to implicate an allegation of error by the district court and is best addressed by the political branches of the federal government. Furthermore, the specific and factually unsupported claim

that the Secretary abuses his authority under the IRA by indiscriminately accepting all applications to place land into trust has little to do with the Yankton Sioux Tribe. There was no evidence at trial that the Secretary accepted all applications to take land into trust, or that there had been any recent successful application by the Tribe to place land into trust. See USA at 175.[20]

E. Alternatively, the trust land within the original boundaries of the 1858 Yankton Sioux Reservation qualifies as a de facto or informal reservation and constitutes Indian country under 18 U.S.C. § 1151(a).

The absence of a formal reservation does not preclude the assertion of federal criminal jurisdiction under 18 U.S.C. § 1151(a). United States v. John, 437 U.S. 634, 649 (1978) (citing United States v. Celestine, 215 U.S. 278, 285 (1909)). "Congress has defined Indian country broadly to include formal and informal reservations . . ." Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). In this regard, the Supreme Court has prescribed the method for determining the existence of an informal Indian reservation under § 1151(a):

> [T]he test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"

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[20] Exhibit 210 does not appear to list a fee to trust transaction more recent than 1984. The IRA regulations allow a 30-day period for challenges to fee to trust acquisitions. 25 C.F.R. § 151.12(b).

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991).

This Court has applied these principles and held that a tract of trust land located two miles from the boundary of the Turtle Mountain Reservation in North Dakota constitutes "a de facto reservation, at least for purposes of federal criminal jurisdiction." United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986). In Azure, the panel observed that the land in question was held by the United States for the benefit of the Turtle Mountain Indians, the Government exercised criminal jurisdiction, and the BIA was present and provided services. Id.[21]

The same analysis applies in this case, and the district court did not err by holding alternatively that the checkerboarded tracts of land constitute, at a minimum, an informal reservation for purposes of jurisdiction under §1151(a). Id. at 1056. The district court correctly interpreted the holdings of this Court and the Supreme Court and simply applied them to the largely undisputed facts of this case.

As it relates to the roughly 6,500 acres of land taken into trust under the provisions of the IRA, the State contends the Supreme Court's Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe holding is inapplicable since the

[21] As in Azure, 801 F.2d at 339, the court also found that the land was a dependent Indian community under § 1151(b). Podhradsky, 529 F. Supp. 2d at 1057.

case did not concern IRA trust land. However, the Tenth Circuit Court of Appeals has considered this precise issue and determined that land taken into trust under the IRA was an informal reservation. See United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000).

In Roberts, a federal prisoner brought a post-conviction challenge to the exercise of federal criminal jurisdiction under 18 U.S.C. § 1153, claiming the location of his crimes was not Indian country under § 1151. The land at issue had been taken into trust by the Secretary pursuant to the IRA and was held by the Government in trust for the Choctaw Nation. The prisoner claimed the land satisfied none of the categories of Indian country described in § 1151 and, further, that taking land into trust could not, itself, establish Indian country. The Tenth Circuit, however, rejected both arguments, observing the broad definition of Indian country is not restricted to formal reservations but can also include informal reservations created when land is taken into trust under § 465 of the IRA. Federal trust status, the Roberts court reasoned, "can demonstrate both federal set aside and superintendence." Roberts, 185 F.3d at 1132. In fact, the procedures used by the Secretary to determine an application to take land into trust necessarily contemplate an affirmative decision by the federal government to set the land aside for use by Indians and its commitment to "exert jurisdiction over the land." Roberts, 185 F.3d at 1132.

The Roberts analysis is eminently persuasive, particularly given the State's failure to cite any decisional law to support its claim that land taken into trust under the IRA cannot constitute an informal reservation. The State's reliance upon dicta from this Court's decision in United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), does not fill the void.

In Stands, this Court affirmed a defendant's convictions for an assault committed off the present-day Rosebud Sioux Indian Reservation because the incident occurred on allotted trust land. During the course of its description of certain types of trust land, however, the Stands panel suggested that tribal trust land outside of a reservation's boundaries may not be Indian country although it acknowledged that the land may constitute a de facto reservation. Stands, 105 F.3d at 1572 n.3. The passage is best read as an expression that off-reservation land taken into trust is not part of a formal reservation but may well constitute a de facto or informal reservation. Regardless, the statement is dicta since the Government did not claim the land in question constituted an informal reservation under § 1151(a), and the panel determined the question of federal jurisdiction under § 1151(c). See id. at n.3 (noting Government did not claim an informal reservation under Azure); see also United States v. Papakee, 485 F. Supp. 2d 1032, 1045 (N.D. Iowa 2007) (Stands comment concerning trust land beyond reservation boundaries is dicta); South Dakota v. U.S.

Dep't of Interior, 401 F. Supp. 2d 1000, 1010 (D.S.D. 2005) (Stands "dicta . . .does not overcome the wealth of legal authority establishing that trust land qualifies as 'Indian country.'").

Another restriction upon the breadth of the Stands panel's comment about off-reservation land is the application of regulations promulgated pursuant to the IRA. Those regulations demonstrate that IRA land acquisitions within the original boundaries of a diminished reservation are not considered "off-reservation." Rather, the regulations define a "reservation" as the area of land encompassed by original boundaries even where the reservation has been diminished. See 25 C.F.R. § 151.2(f). This, in turn, allows the Secretary to treat proposed IRA land acquisitions within the original reservation boundaries as "on-reservation" acquisitions. See 25 C.F.R. § 151.10.

What Stands cannot support, under any credible reading, is the claim that IRA trust land, or even trust land generally, within a diminished reservation can never become an informal reservation despite federal set-aside and superintendence. Such a position is squarely at odds with the Supreme Court's holding in the Oklahoma Tax Comm'n line of cases and this Court's holding in Azure, which precedes the Stands opinion by over a decade.

In the end, the State's reliance upon Stands is nothing more than a component of its persistent claim that the diminishment of the 1858 Reservation by lands ceded to non-Indians (as determined by the Supreme Court in Yankton Sioux) or by the diminishment of allotted lands that passed into non-Indian ownership (as determined in Gaffey) disestablished the Reservation. However, the State's claim incorrectly elevates the form of the Reservation's current configuration above the substance of Congressional intent which granted, set aside and, ultimately, preserved the Tribe's Reservation. Accordingly, the State's claim that IRA land is excepted from the Supreme Court's holdings in the Tax Comm'n line of cases is unsustainable, and the district court's determination that the IRA land, like the other trust land, constitutes an informal reservation was not erroneous.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE UNITED STATES HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FOR ACTIONS CHALLENGING THE VALIDITY OF LANDS HELD IN TRUST FOR THE BENEFIT OF THE TRIBE OR INDIVIDUAL INDIANS.

A. Standard of review.

This Court reviews de novo questions of federal subject matter jurisdiction. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1012-1013 (8th Cir. 2002).

B. The State's effort to challenge the validity of lands taken into trust lacks a basis for the assertion of federal subject matter jurisdiction.

Throughout the proceedings in this case, the district court has repeatedly made clear that it was not determining the title to specific tracts of land. See Podhradsky, 529 F. Supp. 2d at 1043 ("It should be reconfirmed that this case involves jurisdiction issues and does not affect title to real estate."). Similarly, this Court, in remanding, directed the district court "to make any necessary findings relative to the status of Indian lands which are held in trust." Gaffey, 188 F.3d at 1030. It did not direct the district court to undertake a fact-intensive inquiry into the title of land tracts within the Reservation boundaries. Thus, consistent with the prior rulings by the Courts and with the manner in which the claims were presented in the complaints and cross claims (which did not address any specific land tracts), the district court – on remand – considered and determined "the categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation [that] remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a)[.]" Id. at 1042 (emphasis added).

Before the district court on remand and in this appeal, however, the State seeks to challenge the title of particular tracts of land. The State challenges the United States' title to approximately half of the estimated 6,444.47 acres of land taken into

trust after 1934. State's Brief at 28, 49. In particular, the State cites 30 specific parcels of land, totaling approximately 3,120.98 acres, which it contends the United States does not hold in title for the Yankton Sioux Tribe. State's Brief at 49-50. No challenge to any specific parcel was included in the State's counterclaim, and thus it is not properly at issue in this case. Moreover, the State's challenge to the United States' title to the tracts is barred by the Quiet Title Act, 28 U.S.C. § 2409a, as the district court correctly held. Podhradsky, 529 F. Supp. 2d at 1045.

The party seeking to invoke a federal court's jurisdiction has the burden of proving the existence of subject matter jurisdiction. See Riley v. United States, 486 F.3d 1030, 1031-1032 (8th Cir. 2007) (plaintiffs under the FTCA must prove subject matter jurisdiction as a threshold matter). As it relates to actions against the Government, "[t]he United States enjoys sovereign immunity except to the extent it has consented to be sued." Lunsford v. United States, 570 F.2d 221, 224 (8th Cir. 1977) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). "A corollary to the immunity doctrine is the rule that the United States may define the conditions under which actions are permitted against it." Id. (quoting Peterson v. United States, 428 F.2d 368, 369 (8th Cir. 1970)). Waivers of sovereign immunity must be narrowly construed "in favor of the sovereign" with "any ambiguities in its favor." Rutten v.

United States, 299 F.3d 993, 995 (8th Cir. 2002) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992)).

The federal Quiet Title Act (QTA) allows suits to challenge the federal government's interest in land, but its waiver of sovereign immunity does not extend to Indian lands held in trust:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands . . .*

28 U.S.C. § 2409a(a) (emphasis added).

"Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity." Ducheneaux v. Secretary of the Interior, 837 F.2d 340, 342 (8th Cir. 1988) (quoting United States v. Mottaz, 476 U.S. 834, 843 (1986)). Citing this principle, the Tenth Circuit Court of Appeals recently dismissed an appeal which was predicated upon a challenge to land that had been taken into trust during the pendency of an earlier case. See Kansas v. Kempthorne, 516 F.3d 833, 841 (10th Cir. 2008).

Here, the district court correctly denied the State's attempt to challenge title to certain lands taken into trust on the basis that the land allegedly had not been properly accepted by the Secretary of the Interior. See Podhradsky, 529 F. Supp. 2d at 1045. The recorded deeds indicate the parcels at issue are currently held in trust by the United States for the benefit of the Yankton Sioux Tribe. Equally undisputed is the fact that all of the parcels in question were classified by the BIA as trust land when it prepared the trust land spreadsheet (Ex. 210) and the corresponding map (Ex. 209). In fact, the BIA maintains records on parcels only as long as they are in trust. TT 120-121. The State does not exercise criminal jurisdiction on these trust lands, and they are exempt from taxation. See USA at 209-211 (Ex. 206 – letter of Charles Mix County Director of Equalization indicating lands are tax exempt). Under the circumstances, there is no basis for subject matter jurisdiction to allow the State to challenge title to the land held in trust for the Tribe by the Government.

On appeal, the State disregards the jurisdictional issue and fails to even acknowledge the QTA, much less challenge the district court's interpretation of it. Instead, the State presses the merits of its claim (State's Brief at 49-52), ignoring its obligation to demonstrate a basis for subject matter jurisdiction and overlooking the only decision on this topic subject to appellate review – whether the district court erred in its determination that the QTA did not waive sovereign immunity for the

State's challenges to certain trust land. Accordingly, the merits of the State's acceptance-into-trust argument are not reviewable and cannot provide a basis for challenging the district court's decision.

C. Secretarial acceptance is not necessary to determine the questions presented in this remand, and, in any event, the land is validly held in trust.

The district court also indicated that a written acceptance of land into trust was not required. See TT 143-144 (at trial, the court stated "that a deed needn't say that it is a deed going in to [sic] trust pursuant to the 1934 Act, and likewise, beyond that."). Moreover, assuming, arguendo, that (1) the issue is properly presented in this case and (2) the State's challenge to the title of certain trust lands is not foreclosed by the QTA, the State's claim must fail on the merits. The State cites no legal authority for its argument that the land in question is not validly in trust, and the facts (to the extent that they were developed in this case) demonstrate that both the federal and State governments have consistently treated the tracts as lands that were held in trust by the United States for members of the Yankton Sioux Tribe.

Distilled to its essence, the State's argument is not that the United States violated an applicable standard set out in statute, case or regulation. Indeed, the State cites no authority for its claim regarding secretarial approval for IRA acquisitions and offers only an excerpt from internal guidance published by the Department of the

Interior in 1980 – nearly a decade after the last parcel of land at issue was taken into trust. See Ex. 206.

Instead, the State's argument is based simply upon the presence of secretarial approval notations made on some trust deeds but not others. However, all of the IRA land in this case has been treated the same, and the State cannot demonstrate otherwise. In fact, the evidence at trial indicated the County does not tax the IRA trust land in question, the land is considered trust land by the BIA, and the federal government exercises criminal jurisdiction on all trust land within the original 1858 Reservation boundaries. Under the circumstances, the State's secretarial acceptance claim lacks merit even if a basis for federal subject matter jurisdiction existed.

III.

THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE BOUNDARIES OF THE YANKTON SIOUX RESERVATION WERE FROZEN BY THE IRA BUT NOT BY 25 U.S.C. § 398d.

A. Standard of review.

This Court reviews questions of statutory interpretation de novo. American Growers Ins. Co. v. Federal Crop Ins. Corp., 532 F.3d 797, 803 (8th Cir. 2008) (citation omitted).

B. The provisions of 25 U.S.C. § 398d do not allow land transferred in fee to non-Indians after its 1927 enactment to remain part of the Yankton Sioux Reservation.

The 1927 Act provides as follows:

> **§ 398d. Changes in boundaries of Executive order reservations.**
>
> Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

25 U.S.C. § 398d.

The Tribe challenges the district court's determination that the 1927 Act applies only to reservations created by Executive order. However, the district court correctly interpreted the 1927 Act in denying the Tribe's claim that the 1927 Act froze land transfers after its enactment because the Yankton Sioux Reservation was created by treaty, rather than by Executive order. Podhradsky, 529 F. Supp. 2d at 1049-1050.

The text of the statute addresses boundary changes only for reservations created by the President, not for those created by treaty. In addition, the Supreme Court has described the statute as one which applies to Executive order reservations. See Sioux Tribe of Indians v. United States, 316 U.S. 317, 325 n.6 (1942) ("In 1927, Congress

added a provision that any future changes in the boundaries of executive order reservations should be made by Congress alone.").

The Tribe argues that the "or otherwise" language of the 1927 Act makes it applicable to treaty reservations as well. However, even if the 1927 Act applied to the Yankton Sioux Reservation, the requirement for Congressional action was satisfied given this Court's holding in Gaffey that the 1894 Act diminished the Reservation with the transfer in fee of formerly allotted lands to non-Indians.

C. The State was not prejudiced by the district court's determination that the IRA froze the Reservation's boundaries.

The IRA "terminated further allotment of Indian reservation land to individual Indians. . . and extended 'existing periods of trust placed upon any Indian land' until further action by Congress to the contrary." Oglala Sioux Tribe v. Hallett, 708 F.2d 326, 330 (8th Cir. 1983). Although this Court has never held that the IRA "froze" the boundaries of Indian reservations, it has recognized that under the IRA Indian lands could not be diminished. See Hallett, 708 F.2d at 331 n.6 ("Nonetheless, for purposes of this appeal we accept that, at least prior to 1948, section 4 [of the IRA] did restrict the Secretary's power to issue fee patents.").

In this case, the district court's determination that the IRA "froze" the Reservation boundaries is consistent with the precedent of this Court and the evidence

in this particular case. Under this Court's ruling in Gaffey, the Reservation is incrementally diminished as allotted land passes to non-Indians. Any freeze imposed by the IRA related only to individual tracts held by the United States for individual Indians and, even then, applied only to fee patents issued prior to the 1948 enactment of the Supervised Sales Act which expressly allowed the Secretary of the Interior to issue fee patents. Id.; see also Hallett, 708 F.2d at 331 n.6 (suggesting that any freeze upon Indian land alienation imposed by the IRA ended in 1948); 25 U.S.C. § 483.

Here, the district court concluded that any freezing effect the IRA may have had upon land transfers on the Reservation between 1934 and 1948 was neutralized by two facts. First, there was an insufficient evidentiary basis to determine whether or to what extent individual tracts might be implicated.[22] See Podhradsky, 529 F. Supp. 2d at 1051 (noting paucity of information). In addition, the district court determined that the Supervised Sales Act cured any title defects created by fee patents issued between 1934 and 1948. Therefore, even if the district court erred by finding the IRA "froze" the boundaries of the Reservation between 1934 and 1948, its holding did not affect the result in this case or add land to the Reservation.

[22] A review of United States Exhibit 210 reveals "to fee" notations between 1934 and 1948 for a handful of tracts.

Furthermore, no party in this remand proceeding asked the district court to determine the existence of title defects alleged to be the result of improperly issued post-IRA fee patents. The existence of federal subject matter jurisdiction for any such claim and questions of timeliness, standing and the indispensability of other parties affected by these issues are all beyond the pleadings, the Gaffey mandate, and the record.[23] Accordingly, the district court's determination of the IRA frozen boundary issue does not provide a basis for reversal.

IV.

THE STATE AND COUNTY WAIVED ANY ARGUMENT THAT AN EXCEPTION TO THE LAW OF THE CASE DOCTRINE APPLIES BY FAILING TO PRESENT THE ARGUMENT TO THE DISTRICT COURT.

"[A] federal appellate court will not consider an issue not passed upon below." United States v. Unit No. 7 and Unit No. 8 in the Grove Condominium, 890 F.2d 82, 85 (8th Cir. 1989) (en banc) (quoting Stafford v. Ford Motor Co., 790 F.2d 702, 706 (8th Cir. 1986)). Introducing new arguments on appeal exposes an undeveloped district court record and results in an "inherent injustice" to the other parties facing

[23] These same reasons support the district court's decision to not allow the Tribe to litigate its post-Gaffey claim that fee patents were illegally issued following enactment of the Burke Act, 25 U.S.C. § 349. See 98-CR 223 at 5; see also Nichols, 809 F.2d at 1320 (barring forced fee patent claims against the United States).

a new argument for the first time on appeal. See Fjelsta v. Sogg Dermatology, PLC, 488 F.3d 804, 809 (8th Cir. 2007) (citation omitted) (applying rule to refuse consideration of plaintiff's new "whistle blower" theory advanced on appeal).

Here, the State and County argue that the lands reserved under Article VIII of the 1894 Act are not part of the Reservation and, further, that the Reservation has been disestablished. Both claims are contrary to the law of the case determined by this Court in Gaffey. On appeal, the State acknowledges as much and makes an argument that the reserved land and disestablishment determination are excepted from the operation of the law of the case doctrine. The County's brief treats both issues as if they remain subject to unfettered review in this appeal.

However, neither the State nor the County invoked an exception to the law of the case doctrine in the district court remand proceedings following Gaffey[24] even when the district court reminded the parties of the fact that the issues resolved in the previous appeals would not be relitigated in the remand proceeding. In fact, during the final portion of its closing argument at trial, the State suggested that the reserved

[24] In its reply pretrial brief, the State agreed that the United States had correctly identified in its pretrial brief exceptions to the mandate rule. 98-CR 373. However, the State offered no analysis concerning the exceptions and simply repeated its complaint that the Gaffey Court had failed to follow the Yankton Sioux and Decoteau decisions, describing it as a "flagrant error" which would result in a "serious injustice." 98-CR 373 at 22.

land holding could be relitigated not because of an exception to the law of the case doctrine, but because "[t]his is interlocutory." CA 7; see also State's Brief at 58 n.7 (claiming the law of the case does not apply because the remand proceeding was interlocutory). This appears to be a reference to a statement made in the Government's opposition to the petitions for certiorari following Gaffey. The Government's opposition argued, however, that the Gaffey holdings could be reviewed by the Supreme Court following remand, not that the rulings in that decision remained subject to further review by another panel of this Court. This position is consistent with principles of appellate procedure and could not, in any way, be viewed as a license for the State to disregard the Gaffey ruling on remand or in an appeal to this Court after remand. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("[L]aw of the case cannot bind [Supreme Court] in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review.") (citation omitted).

In addition, the State's expansive interpretation of "interlocutory" has not prevented it from selectively invoking the law of the case doctrine during the course of the post-Gaffey remand proceedings. In its 2004 brief to the district court describing the remaining remand issues, the State included a lengthy exposition of the law of the case doctrine and the mandate rule. 98-CR 194 at 3-5; see also State's

mandamus petition at 1-4 (urging narrow scope of issues related to trust land determinations, citing the law of the case doctrine). These principles, the State explained, prevented the district court from considering whether formerly allotted land which had passed in fee to a non-Indian owner was Indian country or whether the original 1858 Reservation boundaries remained intact – both express holdings from Gaffey which were favorable to the State. 98-CR 194 at 5-6. The State also correctly acknowledged that the district court did not have to determine the status of the reserved lands returned to the Tribe since the issue had been decided in Gaffey. 98-CR 194 at 8; see also State's mandamus petition at 29-30 (acknowledging reserved land is part of Reservation).

In any event, the State's appellate effort to revisit the only holdings in Gaffey which it views as adverse overlooks a fundamental tenet of appellate law – a party seeking review must identify the discrete trial court decision which it claims constitutes reversible error. In this case, the State could have preserved a claim that an exception to the law of the case doctrine applied by presenting it in a timely fashion to the district court and obtaining a final ruling. However, in the absence of this effort, there is no district court decision to review. The district court simply applied Gaffey and this Court's mandate concerning the settled issues of the reserved land and disestablishment.

Admittedly, an appellate court can consider issues presented first on appeal where "the proper resolution is beyond any doubt" or "where injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976). However, this case does not present either situation.

The State's disestablishment argument was unsuccessful in Yankton Sioux and in Gaffey. The subsequent efforts to obtain rehearing en banc following Gaffey, then a writ of certiorari from the Supreme Court and, most recently, initial en banc review in this appeal – all in an effort to press its disestablishment claim – have been similarly unsuccessful. Against this backdrop, it is becoming increasingly difficult for the State to credibly argue that its well-traveled disestablishment analysis has any remaining viability, much less that it is correct "beyond any doubt."

In addition, the refusal to consider the State's claim that an exception to the law of the case doctrine applies would not result in any injustice. The Reservation, as it is currently configured, features a small amount of trust land over which neither the State nor the County exercise civil or criminal jurisdiction. The State and the County do exercise jurisdiction over the nearly 400,000 acres pared from the original 1858 Treaty Reservation as a result of the two previous appellate decisions. As the district court noted, the respective law enforcement authorities have established a workable system. Podhradsky, 529 F. Supp. 2d at 1028. Under the circumstances, the record

simply could not sustain a claim of injustice sufficient to allow this Court to consider the State's belated argument that an exception to the law of the case doctrine applies. The argument is, therefore, not presented in this appeal, and the Court should refuse to consider it.

V.

THE LAW OF THE CASE DOCTRINE PRECLUDES THE STATE'S ARGUMENTS THAT THE YANKTON SIOUX RESERVATION HAS BEEN DISESTABLISHED AND LAND RESERVED UNDER THE 1894 ACT IS NOT PART OF THE RESERVATION.

A. This Court's earlier appellate holdings constitute the law of the case.

Subsequent appeals in the same case which involve different panels implicate "two long-standing rules of practice." Maxfield v. Cintas Corp., 487 F.3d 1132, 1143 (8th Cir. 2007). The first is the law of the case doctrine which provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Little Earth of the United Tribes, Inc. v. U.S. Dep't of Housing and Urban Dev., 807 F.2d 1433, 1440-1441 (8th Cir. 1986) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). The doctrine "prevents the relitigation of a settled issue" and is designed to "ensure uniformity of decisions, protect the expectations of the parties and promote judicial economy." Bartsh, 69

F.3d at 866 (citing Bethea v. Levi Strauss & Co., 916 F.2d 453, 456-457 (8th Cir. 1990)).

The law of the case doctrine is "predicated on the premise that there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms o[f] their opinions or speculate o[n] chances from changes in its members." United States v. Becerra, 155 F.3d 740, 752 (8th Cir. 1998) (abrogated on other grounds) (citations and internal quotation omitted). The doctrine not only requires district courts conducting remand proceedings to abide by the holdings in a prior appeal, but it also limits the scope of subsequent appellate review to only the issues addressed in the remand. See Bartsh, 69 F.3d at 866 (issues decided by appellate court are law of the case and must be followed on remand); Omaha Indian Tribe v. Jackson, 854 F.2d 1089, 1094 n.5 (8th Cir. 1988) (subsequent appeal following remand "brings up nothing for revision but the proceedings subsequent to the mandate . . ." (citation omitted)). A court can depart from the law of the case only in the limited circumstances where "a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice." Bartsh, 69 F.3d at 866.

The second principle which applies when a case is considered in a subsequent appeal by a different panel is known as the "prior panel rule." Maxfield, 487 F.3d at

1135. As the name suggests, the rule "provides that one panel has no authority to overrule an earlier decision of another panel[]" and serves to "reinforce[] the law-of-the-case doctrine[.]" Id.; see also Owsley v. Luebbers, 281 F.3d 687, 690 (8th Cir. 2002) ("It is a cardinal rule of our circuit that one panel is bound by the decision of a prior panel.").

In this case, the 14-plus years of litigation have yielded two governing appellate opinions and a number of constituent holdings. Included among these are this Court's holding that the Yankton Sioux Reservation was not disestablished along with its holding that land reserved for agency and other purposes under the 1894 Act is part of the remaining Reservation. Although the State is reluctant to accept these holdings, it could not demonstrate that either is excepted from the operation of the law of the case doctrine even if the argument had not been waived.

Like the State, the United States believes that an aspect (albeit a different one) of the holding in Gaffey was erroneous. The United States believes that the Court in Gaffey erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands. In Gaffey, the Court correctly recognized that Congress' intent to diminish a reservation must be "clear and plain," 188 F.3d at 1021 (quoting Dion, 476 U.S. at 738) and that such intent must be "expressed on the face of the Act or be clear from the surrounding

circumstances and legislative history," id. (quoting Mattz v. Arnett, 412 U.S. at 505. See also Yankton Sioux Tribe, 522 U.S. at 343-344; Hagen v. Utah, 510 U.S. at 411-412; Solem, 465 U.S. at 470-471.

However, in the United States' view, the Court did not correctly apply those principles to the facts of this case because it did not identify any language in the 1894 Act or the 1892 Agreement that "clear[ly] and plain[ly]" evinces an understanding that allotted lands would be separated from the Yankton Sioux Reservation when they passed out of trust status and were sold to non-Indians. Nor did the court identify such language in the negotiation records or other legislative history. But that issue, like the issues resolved in Gaffey that the State attempts to raise in this appeal, were not before the district court on remand and are not properly before the panel now. Consistent with principles of the law of the case, further review of the issues in Gaffey might be raised (after resolution of the Gaffey remand issues by the panel to hear this case) in a petition for rehearing en banc or in a petition for certiorari to the Supreme Court, but they are not properly subject to further review here.[25]

[25] If the Court disagrees with the United States' position on the law of the case and believes that the issues resolved in Gaffey may properly be revisited by the panel in this appeal, the United States requests the opportunity to provide supplemental briefing on the Gaffey diminishment holding.

B. Even if it had presented the district court with a claim that an exception to the law of the case applied, the State did not introduce substantially different evidence on remand concerning the reserved land, and the adherence to the Gaffey Court's holding is not clearly erroneous and does not create a manifest injustice.

1. Substantially different evidence.

In order to constitute substantially new evidence sufficient to avoid the strict requirements of the law of the case doctrine, the evidence must, in fact, be "new" and not merely "newly presented." See Becerra, 155 F.3d at 753-754 (exception does not apply where party had opportunity to present evidence in earlier proceeding). Furthermore, evidence which is not substantially different from the evidence available in an earlier proceeding cannot constitute new evidence. Maxfield, 487 F.3d at 1135-1138.

In a passing acknowledgment of "the 'law of the case' idea," the State contends the reserved land holding should not apply because the Gaffey panel did not have evidence which is "now available." State's Brief at 57-58. In truth, the principal evidence cited by the State as different is the unremarkable fact that the reserved land does not exist in one contiguous block of land. However, this evidence is not different, or new, or even relevant.

Underlying the State's argument is its claim that the Gaffey reserved land holding turned upon the unrevealed premise that the reserved parcels were contiguous. However, the claim rests uneasily upon speculation and an unsupportive record.[26]

Indeed, this Court recognized that remaining trust parcels within the Reservation are scattered throughout the area encompassed by the original 1858 boundaries. Gaffey, 188 F.3d at 1016 (remaining trust land "interspersed in a checkerboard pattern"). Furthermore, there is nothing in the Gaffey opinion which would support the conclusion that the reserved land was a distinct category of trust land on the basis it was presumed to be contiguous.

In addition, the evidence is not new. Exhibit 205, listing the locations and acreages of the various parcels of reserved land, is dated August 27, 1894, and is maintained at the BIA's Yankton Agency as part of the original allotment book. See TT 203-204, Ex. 205. The State's all-or-nothing strategy can hardly explain its overlooking the alleged importance of the location of the reserved parcels, particularly

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[26] The State claims the Gaffey panel was "under the false impression that the agency lands were in a single parcel – the 'mile-square' at Marty" the site of the Yankton Sioux Tribe's headquarters. However, the reference in Gaffey to the "mile square" was not connected to this Court's analysis of reserved land, but simply an expression of the Court's inability to determine the extent of trust land holdings within the original 1858 Treaty boundaries. See Gaffey, 188 F.3d at 1030 (the paragraph referencing the "mile square" begins: "The current amount of Indian trust land on the Yankton Sioux Reservation is unclear from the record.").

given the significance attached to the reserved lands by the Supreme Court in Yankton Sioux. See Yankton Sioux, 522 U.S. at 351 (difficult to imagine why Congress would reserve land if "if it did not anticipate" it would remain part of the reservation). Moreover, the information plainly was available to the defendants at the time Gaffey was litigated, as Southern Missouri moved to submit evidence of the non-contiguous nature of the reserve lands as part of its unsuccessful effort to obtain rehearing en banc. See USA at 212 (Southern Missouri Motion to Enlarge Record on rehearing en banc).

Also, this Court's Gaffey decision can only be viewed as envisioning a checkerboard reservation given its holding that allotted lands which fell out of Indian hands incrementally diminished the reservation boundaries. See Gaffey, 188 F.3d at 1021, 1030-1031. Therefore, the fact that the reserved land does not comprise a contiguous block of land is not relevant to the determination that the land constitutes Indian country under § 1151(a).

The State's additional claim that the reserved lands are treated the same as other trust lands cannot satisfy the substantially different evidence exception to the law of the case doctrine for several reasons. First, the argument appears premised upon an alleged absence of evidence, not new or different evidence. Second, the evidence that federal criminal jurisdiction extends to reserved lands as it does to other land held in

trust is neither new nor different. In fact, it is precisely the same evidence referenced by this Court in Gaffey. See Gaffey, 188 F.3d at 1029 (noting three former U.S. Attorneys testified that the federal government exercised jurisdiction over lands held in trust). In fact, the State's claim actually provides substantive support for the district court's decision that all of the trust land is Indian country under § 1151(a) since all the trust land has been set aside and is subject to the same federal superintendence as the reserved land. Regardless, the State cites no authority for its unlikely suggestion that the reserved land must be treated differently from other Reservation land, and the argument is unsustainable.

2. Clearly erroneous and manifestly unjust.

The exception to the law of the case doctrine requiring a clearly erroneous decision and manifest injustice is narrowly circumscribed. "Only in extraordinary circumstances may this court sustain a departure from the 'law of the case' doctrine on the ground that a prior decision was clearly erroneous." City Public Serv. Bd. v. General Elec. Co., 935 F.2d 78, 82 (5th Cir. 1991). "Mere doubts or disagreement about the wisdom of a prior decision" are insufficient to revisit issues already decided. Id.

The Seventh Circuit Court of Appeals described this principle in more colorful terms: "To be clearly erroneous, a decision must strike us as more than may be or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988). Indeed, "courts rarely invoke [the manifest injustice] exception to the law of the case doctrine and when they do, it is because of post-decision changes in the evidentiary facts or in the applicable law and not because the subsequent panel disagreed with the earlier panel's legal conclusions." Af-Cap, Inc. v. Republic of Congo, 383 F.3d 361, 367 n.6 (5th Cir. 2004).

Here, even if it had been presented to the district court, the State's effort to avoid the law of the case fails because Gaffey's reserved land holding was not clearly erroneous and did not work a manifest injustice. Indeed, the holding is not erroneous under any standard since the 1894 Act contains no discernible intent to diminish the Reservation by the reserved lands.

Also, the modest amount of real estate at issue cannot support a claim of manifest injustice. This is particularly true given the fact all of the reserved land at issue is held in trust for the benefit of the Tribe, and the State and the County do not levy taxes or exercise criminal jurisdiction on it.

The additional claim that the Supreme Court's holding in Yankton Sioux diminished the Reservation by all ceded land, including reserved land, is not sustainable since it equates the mere cession of land with the loss of reservation status. However, the Supreme Court acknowledged it has "repeatedly held that not every surplus land Act diminished the affected reservation[]" even though every surplus land act "necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation[.]" Yankton Sioux, 522 U.S. at 356. Rather, the question of diminishment is one of legislative intent.

In Yankton Sioux, the Supreme Court held that Congress intended to diminish the Reservation by the sale of surplus lands which were opened for non-Indian settlement. Yankton Sioux, 522 U.S. at 344. However, this analysis does not apply to land reserved under Article VIII of the 1894 Act since there was no "present and total surrender of all tribal interests" and the land was not, in fact, opened to non-Indian settlement.[27] There is, therefore, no express Congressional intent to diminish the Reservation by its reserved lands, and nothing in Yankton Sioux suggests – much

[27] The State's claim that the reserved land was ultimately slated for sale to non-Indian settlers is at sharp odds with the interpretations of the Supreme Court and this Court, both of which acknowledged Article VIII to be an indication of a remaining reservation. It is also inconsistent with the subsequent treatment of the reserved parcels. There is no evidence that any reserved tracts were opened to non-Indian settlement and almost all of the land has been returned to Tribal control.

less finds – such an intent. To the contrary, the Supreme Court determined that the language of Article VIII evinced Congressional intent to retain reservation status for the reserved lands since, without a continuing and viable reservation, it was "difficult to imagine why Congress would have reserved lands for such purposes. . ." Id. at 350.

The 1928 BIA report to the Senate on legislation returning the reserved lands to the Tribe represents an insufficient substitute for legislative intent and an even weaker reason to deviate from the law of the case. The report was not even offered as evidence in the post-Gaffey remand trial and owes its presence in the State's appendix to its use at an earlier point in this case's procedural history. See SA 427-428; 98-CR 360 (State's exhibit list does not list 1928 BIA report). However, even if the evidence had been presented to the district court, it simply does not bear upon Congress' intent to retain reservation status for the reserved lands. Indeed, the report does not involve legislative intent at all. It was issued by an executive agency and, at best, simply reports on potential jurisdictional problems in the Reservation area.

C. No exception exists to the law of the case doctrine for this Court's determination in Gaffey that the Reservation was not disestablished by the 1894 Act.

The State advances its now-familiar disestablishment analysis based solely upon its lingering disagreement with the Gaffey holding. Absent is any analysis or

authority which would except from the operation of the law of the case doctrine this Court's determination that the Yankton Sioux Reservation was, in fact, not disestablished.[28] Instead, the State offers only the merits of its argument that the Reservation has been disestablished – the same argument it has advanced unsuccessfully for well over a decade.

Nevertheless, the Gaffey holding that the diminished Reservation continues to exist is the law of the case. It guided the district court proceedings on remand and controls the scope of review on appeal to this panel. The State points to no intervening changes in the law which would suggest clear error, much less manifest injustice. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) ("Manifest injustice . . .is just a surrogate for policy preferences . . .").

Even before Gaffey, the State and County lacked criminal jurisdiction on trust land which is universally treated as exempt from taxation by the Charles Mix County assessor. The State even concedes that 30,051.66 acres of the 37,584.53-acre Reservation constitute Indian country under 18 U.S.C. § 1151(c). Under the

[28] The State simply declares, "[t]he law of the case analysis set forth above applies." State's Brief at 67. However, it does not develop a claim that the broader issue of disestablishment is somehow excepted from the application of the law of the case doctrine.

circumstances, the State's arguments concerning the issue of disestablishment along with the claim that the Gaffey Court incorrectly determined land reserved under the 1894 Act constituted part of the Reservation, cannot be relitigated in this appeal.[29]

CONCLUSION

Based upon the foregoing reasons, the United States respectfully requests that this Court affirm the district court in all respects.

[29] Given the clarity of the Gaffey mandate, the district court's efforts to confine the remand proceedings to the scope of the issues left open by Gaffey, and the inescapable conclusion that the issue of disestablishment is not before the Court in this appeal, the United States will not include an analysis of the State's most recent disestablishment argument in this brief. The United States' position and legal arguments successfully opposing disestablishment are well documented in the record and also ably stated by the Tribe in its brief filed in this appeal.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Corel WordPerfect 12 and contains less than 18,200 words in proportional spacing in 14-pt. type and is therefore in compliance with Fed. R. App. P. 32(a)(7) and the Clerk's order of September 16, 2008, permitting the filing of an overlength brief. I further certify that I have provided to the Court and to each party separately represented by counsel a CD containing the full text of the brief. The CDs have been scanned for viruses using Trend Micro OfficeScan Corporate Edition 6.5 and are virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing brief was made upon the parties by sending via prepaid Federal Express, two true and correct copies thereof and one CD containing the brief to the parties' attorneys of record at their respective addresses as shown, on this 16th day of September, 2008:

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