UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 08-1441; No. 08-1488

YANKTON SIOUX TRIBE, and its Individual Members,

Plaintiffs-Appellees and Cross-Appellants,

and

UNITED STATES OF AMERICA, on its Own Behalf and for the Benefit of the Yankton Sioux Tribe,

Plaintiffs-Appellees,

v.

SCOTT PODHRADSKY, State's Attorney of Charles Mix County; C. RED ALLEN, member of the Charles Mix, South Dakota County Commission; KEITH MUSHITZ, member of Charles Mix, South Dakota County Commission; SHARON DRAPEAU, member of the Charles Mix, South Dakota County Commission; M. MICHAEL ROUNDS, Governor of South Dakota; LAWRENCE E. LONG, Attorney General of South Dakota, and SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT,

Defendants and Appellants.

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

THE HONORABLE LAWRENCE L. PIERSOL
United States District Court Judge

REPLY BRIEF OF APPELLEE/ CROSS-APPELLANT YANKTON SIOUX TRIBE and its Individual Members

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INTRODUCTION

This case is not about tribal jurisdiction over non-Indians. It is about state criminal jurisdiction over reservation Indians in their homeland. The question before the Court is to what extent the reservation established by the 1858 Treaty between the United States and the Yankton Sioux Tribe was diminished by the 1894 Act of Congress. The 1894 Act was not a unilateral act of Congress - it was the ratification of a negotiated agreement between the United States and the Yankton Sioux Tribe, which the Supreme Court has previously ruled, and the State concedes, has the same force and effect as a treaty between the United States and a tribe. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998); SRB at 31.[1]

In their Briefs, the State and County once again urge this Court to ignore the canons of constructions and standards of review required to interpret agreements with Indian tribes. Instead, they urge this Court to rely solely on what they deem "the reasonable expectations of non-Indians," as justification for disestablishing a

[1] "SB" refers to the State's Opening Brief. "SAdd." refers to the State's Addendum. "SRB" refers to the State's Response Brief. "SRAdd." refers to the State's Reply Brief Addendum. "T.T." refers to the Trial Transcript in this case. "TB" refers to the Tribe's Opening Brief. "CRB" refers to the County's Response Brief in this matter. "USB" refers to the United States' Opening Brief in this matter. "U.S.App."refers to the United States' Appendix in this matter. "T.R.Add." Refers to the Addendum to this Brief.

reservation with absolutely no express Congressional act and no unequivocal expression of Congressional or Tribal intent. The State does not point to any statute or legislative history in 1894, or in any later statutes, expressing Congressional intent to disestablish the Yankton Reservation, or to diminish the reservation by lands not ceded in Articles I and XI of the 1894 Act.

In so doing, they ignore the long held canons of construction that have guided the federal courts for over one hundred years. Most importantly, that there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other 'and chose to resolve that conflict by abrogating the treaty.'" United States v. Dion, 476 U.S. 734, 740 (1986). The 1894 Act, like the Treaty of 1855 ,"was not a grant of rights to the Indians, but was a grant of rights from them - a reservation of those not granted.'" Washington State Commercial Passengers Fishing Vessel Assn., 443 U.S. 658, 680 (1979). "**[O]nly Congress can divest a reservation of its land** and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until **Congress** explicitly indicates otherwise". Solem v. Bartlett, 465 U.S. 463, 470 (1984) (emphasis added).

ARGUMENT

A. Indian-owned Fee Lands Located on Original Allotments are part of the Yankton Reservation.

The State argues that once a fee patent was issued on allotments, the land was subject to State jurisdiction. SRB at 3-4. The State then infers that the subjection of land to State jurisdiction for tax purposes also removes the land from the Yankton Reservation. In so arguing, the State makes a fundamental mistake. The State relies upon 25 U.S.C. 1151(c), which deals with allotted lands outside of a reservation. However, the allotments on the Yankton Reservation were never "outside a reservation." Thus, the rule of Solem v. Bartlett applies, that land, once part of a reservation, retains that status regardless of what happens to the title thereafter. 465 U.S. 463, 470 (1984).

The State's reliance on Larkin v Paugh, 276 U.S. 432, 439 (1928) is inapposite - that case was about state court jurisdiction over a title dispute on a fee patented allotment. It did not consider whether the land remained part of the reservation, or was still subject to federal criminal jurisdiction, which are the questions at issue in this case. Similarly, United States v. Rickert, 188 U.S. 432, 436-37 (1903) and United States v. Pelican, 232 U.S. 442, 447 (1914) do not stand for the proposition that once a fee patent is issued, an allotment is no longer part

of a reservation. Pelican supports the Tribe's position. The Court stated, "[t]he evident purpose of Congress was to carve out of the portion of the reservation restored to the public domain the lands to be allotted and reserved, as stated, and to make the restoration effective only as to the residue." Id. at 447. This is precisely what the 1894 Act did at Yankton. It carved out allotments and agency reserve lands from restoration to the public domain and they remained part of the Yankton Reservation. As the Court in Pelican found, "we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control." Id. at 449-450. (Citations omitted).

In Rickert, the Court held that allotments held in trust were not taxable by the State. The Court did not address reservation diminishment. 188 U.S. at 437.

The State relies upon 1926 and 1927 Interior official reports to Congress to support its theory that once allotted land was fee patented or sold it lost its reservation status. SRB at 7. However, both reports are, by their own description, "the Annual Report of this reservation." SRAdd. 3-5. Both reports acknowledge that federal criminal jurisdiction was **exclusive** over both allotments held in trust and agency reserve lands. SR Add. 3, par. 11; SRAdd. 5, par. 11. Neither report made any statement about fee lands. If the State's argument is upheld, over half of

every Indian reservation in the United States would be diminished because the Dawes Act and its progeny alienated trust restrictions on allotments.

The United States exercised criminal jurisdiction over allotments held in fee status from the late 1800's through the early 1900's and from 1995 until 1999. TB 21, TA 1-4; TA 24, TA 53-65; TA 70-71; SA 73-75. The Bureau of Indian Affairs (BIA) provides services within the entire area regardless of fee land status. T.T. 16-21.

Indian owned allotments in fee status have retained their character as reservation lands. United States' executive officials' efforts to dispossess Indian owners of land through forced fee patenting and forced sale of heirship lands without consent of heirs violated Article XIII (guaranteeing "undisturbed and peaceable possession" of allotted lands); Article XIV ("Congress shall never pass any act alienating any part of these allotted lands from the Indians"); and Article XVIII of the 1894 Act. The allotments retained by Tribal member owners in trust and fee were never returned to the public domain and are therefore still part of the Yankton Reservation. SA 355-356; TB 13-14.

As the Tribe argued at trial, tribal member owned fee land holdings are significant. T.T. 84:1-25; 85:1-25; 86: 2-5. The Tribe offered Exhibit 12 to document Indian-owned fee land holdings, demonstrating that the Indian character

of the area extends beyond present day trust land holdings. T.T. 88: 5-6, 25; 89:1. It was admitted for all purposes. T.T. 99:20-22. At Trial, the Tribe offered Exhibit 9, received for illustrative purposes, which documented all original allotments on the Yankton Reservation. T.T. 68:1-5. A finding that fee lands held by tribal members and the Tribe are part of the Yankton Reservation is consistent with the text of the 1894 Act and the ruling in Solem v. Bartlett that no matter what happens to the title of land, it retains its reservation status unless Congress has expressly removed the land from the reservation. 465 U.S. at 470.

B. **Allotted Lands and Agency Reserve Lands Within the Reservation Established by the 1858 Yankton Treaty That Were Not Sold Under Authority of Article I and Article XI of the 1894 Act Remain Part of the Yankton Reservation.**

The State concedes that if allotments are part of the Yankton Reservation, then whether they retain their trust status or are placed in fee status should not affect their status as reservation lands. SRB at 9. In twisted logic, the State then argues that because of this Court's ruling in Gaffey, 188 F.3d 1010 (8th Cir. 1999), the allotments could not be reservation lands. However, the Gaffey Court relied heavily upon the State's argument that the "reasonable expectations of non-Indians" should result in non-Indian held fee lands being excluded from the Yankton Reservation in what is the first *de facto* diminishment of an Indian

reservation with no explicit congressional language and no supporting legislative history. The canons of construction applicable to treaty interpretation exist to protect the reasonable expectations of Tribes and Indian people because they were the vulnerable parties in treaty negotiations whose expectations need this Court's protection to be enforced. Washington State Commercial Passenger Fishing Vessel Ass'n. 443 U.S. at 675-76. The State points to no provision of the 1894 Act that supports their position.

The State does not articulate how the allotments were severed from the Yankton Reservation that was established under the 1855 Treaty, many of which were originally allotted prior to the 1894 Act under Article 10 of the 1855 Treaty. SRB at 11; TA 80-81. The Tribe has carefully laid out each provision of the 1894 Act that ensured the allotments remained part of the Yankton Reservation. TB 31-34. Specifically, allotments are part of the reservation under Article XIII (guaranteeing "undisturbed and peaceable possession" of allotted lands); Article XIV ("Congress shall never pass any act alienating any part of these allotted lands from the Indians"); and Article XVIII of the 1894 Act. Many of these lands have been retained throughout history by Tribal member owners and the Tribe, and as such remain part of the Yankton Reservation. SA 355-356; TB 13-14; 31-34. Tribal intent to reserve agency lands and allotments from sale in 1894 and to

protect such lands from any future actions of the United States is clear in these Articles of the 1894 Act and in the legislative history. TB 10-14; 30-36. The State fails to articulate how or why the Court can simply ignore this specific language in the 1894 Act and the legislative history.

Under the 1894 Act, all allotments remained part of the Yankton Reservation, except those allotments of tribal members who died without heirs prior to 1919 under Article XI. As this Court has already held, nothing in the legislative history or the language of the 1894 Act evinces any intent to disestablish the Yankton Reservation. Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1029 (8th Cir. 1999); TB 60-62. Likewise, there simply is no Congressional intent to eliminate the allotments from the reservation. TB 62-67.

Yankton is no different than numerous other reservations diminished by lands sales effectuated under the Dawes Act by an agreement. TB 67-69. Other Circuits, when faced with almost identical land sale agreements that allotted all of the land on a reservation except agency reserves, have consistently held that the allotments retain their reservation status. In United States v. Southern Pacific Transportation Co., the Ninth Circuit held that where the Tribe entered into an agreement to cede all lands except for allotments and agency reserves, the allotments and agency reserve retain their reservation status. 543 F.2d 676, 690

(9th Cir. 1976); T.R.Add. 2-3. The Ninth Circuit Court found that, "revocation of withdrawals from public land for reservation use may not be accomplished, by circumstances or procedures less formal than those attending (the withdrawal, or else) confusion would be encouraged in the field of property law, a field in which certainty has undisputed advantages." Id. If this Court rules that the allotments lost their reservation status with the issuance of a fee patent, or with their forced sale in violation of the 1894 Act, the Court will be permitting a process less formal than Congressional action to diminish the reservation and change the reservation boundary.

In United States v. Webb, the Ninth Circuit held that a land sale agreement between the Nez Perce Tribe and the United States did not sever allotments from the reservation - even after the allotments passed into fee status they retained their reservation status. 219 F.3d 1127, 1133 (9th Cir. 2000). The Nez Perce Agreement was almost identical to the Yankton Agreement - both allotted all lands except limited reserves and ceded all remaining land for homesteading. Id. at 1131; SA 335, SA 354; T.R.Add. 4-10. In both, when the United States could not secure Agreement from the Tribal Council, they held smaller meetings throughout the reservation to acquire a majority of tribal member signatures. Webb, 219 F.3d at 1130-1131; SA 337; SA 339; SA 349. In both cases, Congress ratified the land

sale agreements in 1894. Id. at 1131, T.R.Add. 10; TA 73. In Webb, the Court held that because there was no express Congressional intent nor Tribal acquiescence to diminish the reservation by allotment of lands, allotments retain their reservation status even after fee title was issued. Id. at 1138. The Court stated, "the nineteenth century concept of 'tribal ownership' was unquestionably broad enough to encompass **allotted lands**." Id.

Similarly, the United States Treaty of Point Elliott authorized the allotment of Tulalip Tribe lands in 1885. United States v. Celestine, 215 U.S. 278, 285 (1909). In Celestine, the Supreme Court specifically held that fee patented allotments remained part of the Tulalip Reservation. Id. at 287. The Court concluded that neither allotment, nor fee patenting of an allotment, nor the granting of state citizenship in an agreement revoke the status of land as reservation land. Id. Similarly, the allotment of all lands at the Grand Portage Reservation and opening of the remainder of the reservation under the Nelson Act was held not to result in the diminishment of the Reservation by the remaining allotments. Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706 (D. Minn. 1998) (unpublished) at T.Add.; T.R.Add. 11-15.

The State and County do not address any of these cases and have therefore waived argument thereon. In all of these cases of specifically negotiated

agreements with Tribes, the Court determined that the agency reserves and original allotments remained part of the reservation - they did not become Indian Country under 25 U.S.C. §1151(c).

Indian allotments as a distinct category of Indian Country under 25 U.S.C. §1151(c) exist because the Secretary of Interior issued allotments on federal lands outside reservations. As Cohen's Handbook on Federal Indian Law explains, 25 U.S.C. §1151(c) is the only subsection where title to the land determines its status as Indian country. 1982 Ed., Ch. 1, Sec. D3, p. 40. "Since 1875 a number of statutes have allowed individual Indians to obtain trust or restricted parcels out of the public domain and not within any Indian Reservation." Id.

The Yankton Reservation allotments are not covered by 25 U.S.C. §1151(c) as they were never returned to the public domain nor carved out of public domain land. The 1895 Proclamation of President Cleveland states clearly, only unallotted and unreserved lands were restored to the public domain and opened for settlement by the 1894 Act of Congress. TA 72-73. The Supreme Court recognized in Ash Sheep Co. v. United States that land sale agreements between Congress and a Tribe do not remove land from Indian holding until the land is actually sold. 252 U.S. 159, 166 (1920). Thus, allotments and agency lands not sold under the authority of the 1894 Act retained their reservation status.

The State fails to address any of the Tribe's arguments regarding agency reserve lands, specifically ignoring two acts of Congress dealing with agency reserve lands and their return to the Tribe and describing those agency reserves as "within the Yankton Indian Reservation" which confirms that it included both agency reserves and allotments after 1894. SRB 34-36; TB 55-58; TAdd. 29, 45 Stat. 1167; 41 Stat. 1468 (1920).

C. Lands Taken into Trust Within the 1858 Yankton Treaty Reservation Boundary are part of the Yankton Reservation.

The State argues that lands taken into trust after 1934 are not reservation land because a proclamation is required under 25 U.S.C. §467. SRB at 13. The State mischaracterizes the position taken by the United States and the Tribe as one of asserting that the original 1858 Treaty boundaries have been maintained. Id. What the Tribe and United States argue is that 25 U.S.C. §465 does not require a proclamation to add land to an existing reservation regardless of whether the land added is within the diminished reservation, or outside the diminished reservation but within the original reservation boundary. This interpretation is supported by 25 C.F.R. §151.2(f). TB at 50. The State provides no answer to this regulation. Further, over 5,000 acres of the tribal trust land acquired under 25 U.S.C. §465 were trust lands acquired from allottees and have always been trust land. TB at 48.

The State argues that BIA leasing of trust lands and Federal criminal jurisdiction over trust lands do not create a reservation at Yankton. SRB at 15, 19-20. The State assumes that the Tribe and United States are establishing a new reservation. Once again, the State and County point to no Congressional language in the 1894 Act or afterward disestablishing the Yankton Reservation. The maintenance of BIA leasing authority and federal criminal jurisdiction indicate a reservation has **continuously existed**. TB at 51-52.

The State relies almost exclusively upon the holding in United States v. Stands, to argue that the taking of land into trust status does not place such lands outside of state criminal and civil jurisdiction. 105 F.3d 1565 (8th Cir. 1997), cert. denied, 522 U.S. 841. SRB at 17. Stands involved allotments located outside of a reservation, which were ruled to be under federal criminal jurisdiction. It has no application to this case. TB 55. The State's argument that elimination of state jurisdiction with the placement of lands into trust status under 25 U.S.C. §465 violates the United States constitution is without merit. This argument was asserted nowhere in the State's Opening Brief or it's Notice of Appeal. This Court's ruling in South Dakota v. Dep't. of Interior, already rejected this argument. 423 F.3d 790, 797 (8th Cir., 2006), cert. denied, 127 S.Ct. 67.

The Tribe has already addressed why reliance upon United States v.

Venetie is wholly misplaced. TB at 50-51. Venetie, as with Sandoval and Azure, addressed whether the state had jurisdiction over lands not held in trust by the United States and not part of a reservation created by Treaty or Congressional statute. United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986); United States v. Sandoval, 231 U.S. 28, 48 (1913). This Circuit has dispositively ruled that trust status itself can demonstrate both federal set aside and superintendence. South Dakota v. U.S. Dep't. of Interior, 475 F.3d 993, 999 (8th Cir. 2007); accord, United States v. Roberts, 185 F.3d 1125, 1132 (10th Cir 1999). More importantly, the State of South Dakota has never exerted **any** governance over Yankton trust lands. SA 3-4.

D. Lands Currently Held in Trust by the United States are Part of the Reservation.

The State asserts that 3,323,49 acres were not taken into trust properly and therefore should be excluded from the Yankton Reservation. SRB at 23. The State does not, however, explain how the land could be maintained in trust status yet not be in trust and therefore not part of the Yankton Reservation. The Quiet Title Act does apply to this case, and therefore, the land is in trust. TB at 53-54. The deeds the State questions all state they are granted to the "United States of America in trust for the Yankton Sioux Tribe." Ex. 202a-202aaa. Even the Charles Mix

County Auditor's Office has acknowledged these lands are trust lands held by the United States since the date they were acquired. TA 118. Further, they were allotments and agency reserve lands not ceded under the 1894 Act.

E. The Tribe's Claims to Allotted Lands That Were Not Transferred into Fee Status Under Authority of the 1894 Act rre Meritorious.

1. The Tribe's Claims to Fee Lands not Held By Indians Should Not Be Dismissed as Waived.

The State asserts the Tribe's claim to fee lands within the 1858 Yankton Treaty Territory, not ceded under the 1894 Act and for which there was no consent to sale to non-Indians, was not raised in prior litigation and briefing. SRB at 24. However, this was the precise question before the Court from the day the Complaint was filed - whether any or all of allotted lands that are now in fee status retain their reservation status. Doc. 1; USA 101. The trust lands were never in dispute under the original Tribal Complaint.

The District Court issued an Order on December 15, 2006 that it would not hear any arguments on title to "forced fee patent" tracts of land. Doc. 223 at 5. However, the District Court found that, "the status of fee lands is to be decided on this remand *to the extent that* the status of nonceded fee lands was not decided by the superior courts." Doc. 223 at 3. The Eighth Circuit in Gaffey determined only that Agency reserve lands were part of the Yankton Reservation, and that the

reservation had not been disestablished. Gaffey, 188 F.3d at 1030. Further, the Gaffey Court did not decide whether Indian owned fee lands are part of the reservation, leaving that issue open on remand. Id.

The Tribe has a right to appeal the District Court's final Order in this case that fee lands, except those held continuously since 1894 by tribal members, are no longer part of the Yankton Reservation. There is no requirement that the Tribe appeal an Interim Order on an Interlocutory Appeal. Rather, the Tribe may await the conclusion of the remand and appeal the Court's refusal to consider an issue presented to the Court at that time, particularly where failure to examine the issue affects the substantial rights of the party, or where the error has had more than a slight influence on the outcome. United States v. Ballew, 40 F.3d 936, 941 (8th Cir. 1994). Interlocutory appeals are disfavored as they result in piecemeal litigation. White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994).

Further, the Eighth Circuit already ruled consideration of the status of fee lands on remand was not beyond the scope of the case mandate when the State's Petition for Writ of Mandamus presented the issue of whether the Eighth Circuit case mandate in Gaffey "confined the proceedings on remand to *lands now held in trust* and (2) established that no *other* lands within the 1858 boundaries were 'reservation.'" USA at 56, SRB at 8-10. That Petition for a Writ of Mandamus

was denied by this Court. Doc. 276.

Mid-American Energy Co. involved whether a plaintiff could file an amended complaint alleging new claims after an appeal and remand, where the appeal dispositively decided the new issues claimed in the amended complaint. This Court granted a Writ of Mandamus and ruled the District Court exceeded the case mandate on remand. 286 F.3d 488 (8th Cir. 2002). In this case, the Eighth Circuit rejected the State's claim that arguments on fee lands were beyond the scope of the mandate. Likewise, in Morris, the precise issue was decided on the first appeal, unlike this case where the Eighth Circuit has not determined that all fee lands are outside the Yankton Reservation.

The rule of claim preclusion on a second appeal "is prudential, not jurisdictional." Kessler v. National Enters., Inc., 203 F.3d 1058, 1059 (8th Cir. 2000). Further, "courts should not enforce the rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals." Id.

In this case, evidence was offered at trial on the present day status of allotted lands held in fee through Exhibits 9, 10, and 12. Some was admitted and some was precluded. The District Court's pre-trial order limited what evidence

would be considered. The original appeal to the Eighth Circuit specifically did not decide what lands were part of the Yankton Reservation, except for holding that reserve lands were included in the reservation. Gaffey, 188 F.3d at 1030. In a similar circumstance, where the precise issue was not decided on the first appeal, this Court has held the analysis in Morris v. National Can Corp., 988 F.2d 50 (8th Cir. 1993), inapplicable. Mountain Pure, LLC v. Bank of America, 2008 WL 2781458 (E.D. Ark. 2008); .

The Tribe has continuously asserted that allotments were reserved by the 1894 Act as part of the reservation in it's pre-trial briefing, as acknowledged by the United States. Doc. 346, p. 4; Doc. 347, p. 4. The District Court acknowledged that information on Acts of Congress and their effect on reservation boundaries is relevant to the boundaries of the Yankton Reservation in a November 8, 2007 Pre-trial Order. Doc. 399, p. 2. Issues that have been raised in prior briefing are not waived, when expanded upon on Appeal. Liverpool & London S.S. Protection and Indem. Ass'n. Ltd. v. Queen of Leman MV, 296 F.3d 350, 355 (5th Cir. 2002); Puerta v. United States, 121 F.3d 1338, 1341-42 (9th Cir. 1997).

The State asserts that the Tribe did not offer proof of the issue at trial. SRB at 25. The Tribe did offer proof of Indian fee land holdings of lands originally

allotted when it offered Exhibits 10 and 12. T.T. 85:10-18; 86: 5-10. Exhibit 12 documenting the existence of Indian owned fee lands was offered and admitted. T.T. 88:5-6; 88:23-25; 89:1. Exhibit 10 was offered but not admitted by the Court. T.T. 89: 8; 276:11-14. Exhibit 9, showing the location of all original allotments, was admitted for illustrative purposes.

Even more importantly, the State argued to this Court that heirship lands and forced fee patent lands had passed into non-Indian hands under authority of the Burke Act of 1906 and the Dawes Act and therefore could not be part of the Reservation, even if held in trust status today, including lists of these lands in its Appendix. SB 13-14; SA 408-421; SA 432, 435-36. This argument was raised by the State and the Tribe is entitled to respond and to present legal argument to explain why the State's theory on these land transfers on Appeal is incorrect. Hadfield v. United States, 979 F.2d 844, fn. 1 (1st Cir. 1992). The State is attempting to have such evidence admitted for their purposes of demonstrating the allotments passed into non-Indian hands under authority of the 1894 Act, while prohibiting the Tribe from answering its assertions by responding that these lands were not sold under authority of the 1894 Act, but rather, passed into non-Indian hands in violation of the 1894 Act, justifying their retention as part of the Yankton Reservation. TB 31-34; TB 37-38.

Refusal to examine on appeal which allotments the 1894 Act and Agreement contemplated "passing out of Indian hands," in the words of the Gaffey Court, would work a manifest injustice by creating a *de facto* diminishment of the reservation without any analysis of whether there was explicit Congressional and Tribal authorization in the 1894 Act or any subsequent Acts of Congress. This alone justifies consideration of the arguments presented. United States v. Aramony, 166 F.3d 655, 662 (4th Cir. 1999); accord, Chicago St. P., M. & O. Ry. Co. V. Kulp, 102 F.2d 352, 354 (8th Cir. 1939), cert. denied, 307 U.S. 636; Hormel v. Helvering, 312 U.S. 552, 555-557 (1941) (legal issues may be considered by appellate court even if not raised below).

The complete lack of any legislative language or congressional intent in any of the acts superceding the 1894 Act to diminish the Yankton Reservation by allotment of land supports the Tribe's argument, made at trial, that the Yankton Reservation includes all fee lands that were originally allotments not sold under Articles I or XI of the 1894 Act. The allotments meeting this description were included in Exhibit 9, offered at trial, received for illustrative purposes by the Court, and referred to repeatedly by all parties in the trial. 2007 T. 67:22-25; 68:1-5; 215:5-7.

Congress has repeatedly recognized the existence of the Yankton Reservation with enactments in 1896 (TB 15), 1920 (TB 17), 1932 (TB 17), 1929 (TB 18), 1992 (TB 20), and in 2002 with the passage of an Act describing the Fort Randall Dam as overlying "the Western boundary of the Yankton Sioux Indian Reservation." TB 15, 20-21; Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, Pub. L. 107-331, 116 Stat. 2834 et. seq. (2002). To ignore these repeated Congressional reaffirmations would work a manifest injustice.

2. The Transfer of Land into Fee Status Does Not Eliminate its Reservation Status Without Express Congressional intent to Eliminate its Reservation Status.

The State misinterprets the Tribe's argument regarding whether the Burke Act and other Congressional Acts expanding the Dawes Act allotment policy diminished the Yankton Reservation. SRB at 26-27. The Tribe is not challenging present day land holder title to the allotted lands. A statute of limitations on challenging land title does not prohibit a Tribe from bringing an action to dispute state jurisdiction over Indians on such lands on the basis that Congress did not diminish the reservation when land title passed from the Tribe or allottees to another party. Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). As in Lower Brule, Yankton here does not bring a claim for title to illegally transferred lands. Rather, the Tribe claims

that the lack of legal authority to alienate such lands from the reservation supports the conclusion that the State lacks criminal jurisdiction over tribal members on such lands, regardless of who holds title. The determination of whether land is part of a reservation is simply not the same as a determination that the Tribe may challenge title and ownership of present day title holders.

The question is whether there was ever Congressional intent to diminish the Yankton Reservation by allotments that have passed into fee status through *ultra vires* acts of executive branch officials in violation of the 1894 Act of Congress. The Gaffey ruling that Congress foresaw that some lands would pass into non-Indian hands and lose their reservation status, does not preclude a finding that lands that were forcibly alienated from tribal members and sold to non-Indians, in violation of Articles XIII and XIV of the 1894 Act, remained reservation lands because Congress evinced no intent to diminish the reservation by forced alienation by executive branch officials. Nor did the Tribe did not consent to such alienation in 1892. TB 37-39. When the Tribe exempted the land from alienation by Congress and Congress consented to that restriction in 1894, there was no further need for the Tribe to specifically reserve its jurisdiction over the land - the Tribe had reserved the land itself. A review of treaties with tribes in the United States will reveal there is no treaty ever made where a Tribe had to expressly

reserve its jurisdiction over non-Indians. The entire point of treaties was to protect the lands from taking by the United States at a time when the states did not exist or were becoming newly formed. The Supreme Court has already held the 1894 Act was not a unilateral Act of Congress, thus eliminating the ability of Congress to alienate land from the reservation without Tribal consent.

Neither the United States Supreme Court nor this Court has ever found that any of the Acts of Congress passed in furtherance of the Allotment policies of the Dawes Act, standing alone, diminished an Indian reservation. To the contrary, this Court and other Circuit Courts have repeatedly held that such acts did not diminish reservations. Solem v. Bartlett, 465 U.S. at 1168; City of New Town v. United States, 454 F.2d 121, 122-123 (8th Cir. 1972); United States v. Webb, 219 F.3d at 1130; Mattz v. Arnett, 412 U.S. 481, 496 (1973); United States v. Pelican, 232 U.S. at 446-447.

To now rule that lands the 1894 Act did not remove from the Yankton Reservation, and which were specifically reserved with a promise that such lands would never be forcibly alienated by Congress under Articles XIII and XIV of the 1894 Act, are no longer part of that homeland because non-Indians now own them in fee status flies in the face of this long line of precedent requiring more than looking at the present day title holder to the land.

The State claims Nichols v. Rysavy foreclosed argument on the Burke Act. SRB at 27. However, the State ignores the Tribe's argument, supported by this case, that the Burke Act did not authorize a diminishment of the reservation. TB 37-38. Nichols ruled only that allottee heirs' claims to return of forced fee patents issued under the 1906 Burke Act are barred by the statute of limitations. The Court did not rule on the merits of the claim that the forced fee patenting was an illegal act. 809 F.2d 1317, 1326-1327 (8th Cir. 1986). Unlike the case in Nichols, the Tribe is not claiming title to forced fee patented lands - it is claiming such lands are part of the reservation.

The State never answers the argument that the federal courts have never held, on the basis of county exercise of criminal jurisdiction over Indians **without legal authority**, that the expectations of the County standing alone can produce the diminishment of an Indian reservation. City of New Town v. United States, 454 F.2d at 123 (county exercise of criminal jurisdiction over Indians for more than 50 years irrelevant - no congressional intent to diminish the reservation); Solem v. Bartlett, 465 U.S. at 1171, n.23 (63 years of county exercise of criminal jurisdiction over Indians and non-Indians not justification for diminishment - no Congressional intent present).

F. The 1927 Act Eliminated Executive Branch Authority to Diminish, Create, or Expand Indian Reservations Without Congressional Authority.

The State attempts to argue that the 1927 Act argument was waived. SRB at 29. However, the State made this same argument in it's Petition for a Writ of Mandamus. USA 56. That Petition was denied.[2] Doc. 276.

The State claims the 1927 Act only applies to Executive Order reservations because that is what the title of the section indicates. The Tribe has already answered this argument - the Title of the Act was not part of the law enacted by Congress but was inserted later. Further, the title cannot supercede the actual language of the statute under the Canons of Construction. TB 41; United States v. Sabri, 183 F. Supp.2d 1145, 1152 (D. Minn. 2002), rev'd in part on other grounds, 326 F.3d 937 (8th Cir. 2003), aff'd and remanded, 541 U.S. 600 (2003).

The State claims the Tribe's interpretation makes the words "Executive Order" superfluous. SRB at 30. However, the only the Tribe's interpretation gives meaning to the term "or otherwise." The Tribe's interpretation does not render the words "Executive Order" irrelevant. Executive Order reservations are retained, as specifically mentioned, because after creation of Executive Order reservations was abolished in 1919 by Congress, reservations, including Treaty

[2]For the same reasons, the 1934 IRA argument is not waived. SRB 32, fn 4.

reservations expanded by executive order, were still being diminished, necessitating a statutory clarification that no reservations, including those created by Executive Order, could be altered without an Act of Congress. TB 39; See, e.g., Sioux Nation v. United States, 316 U.S. 317 (1942).

The Tribe's reliance upon United States v. Southern Pacific Transp. Co. is appropriate as it concerned the effect of the 1927 Act upon all reservations including Executive Order reservations. Further, the Walker River Reservation, while originally created by Executive Order, at the time of this case in 1976, was confirmed by Congressional Act. Act of May 27, 1902, 32 Stat. 245-260; Act of March 3, 1928, 45 Stat. 160. As with many reservations, both Yankton and Walker River Reservations' land character were affected by both Congressional and Executive branch actions. The entire intent of the 1927 Act was to eliminate differential treatment and to make it clear that diminishments of **any** reservation boundaries could not occur without Congressional action.

The only way passage of land into fee status could diminish the Yankton Reservation is if the Court holds that executive branch action to pass title into fee status was a valid diminishment, and if so held, the 1927 Act eliminated executive branch authority to diminish a reservation. TB 42. The Tribe points out that the Yankton Reservation of 1855, as diminished in 1894, did not come into existence

until executive branch action was taken, highlighting why a reading of the 1927 Act excluding Yankton or any other "Treaty" reservation from the operation of the Act is not rational. TB 42.

G. The 1934 Indian Reorganization Act Eliminated Authority to Diminish the Reservation by Fee Patent Issuance and Such Authority was Not Restored by the 1948 Supervised Sales Act.

The State claims that the 1934 IRA did not prevent the issuance of fee patents to Indian allottees. SRB at 33. Nichols v. Rysavy does not supports the state's position. 809 F.2d 1317 (8th Cir. 1986). The Nichols Court ruled that allottee heirs' claims to return of forced fee patents issued under the 1906 Burke Act are barred by the statute of limitations. The Court reached no ruling on the merits of the claim that the forced fee patenting was illegal. Id. at 1326-1327. Further, the case acknowledges that the 1934 IRA stopped the issuance of patents entirely. Id. at 1323. The State next claims Oglala Sioux Tribe v. Hallett supports their claim that the 1934 IRA halted issuance of fee patents, by omitting the sentence following the text they quote, which reads, "for purposes of this appeal we accept that at least prior to 1948, Section 4 did restrict the Secretary's power to issue fee patents. 708 F.2d 326, 333, fn. 6 (8th Cir. 1983).

Neither the State nor the United States answer the very distinct differences between the broad and sweeping ameliorative intent of the 1934 IRA to restrict

executive branch officials' authority to diminish Indian reservations, and the 1948 Supervised Sales Act's limited intent to allow voluntary transfer of land from trust status to fee status. TB at 45-46. This must be considered in light of the passage of 25 U.S.C. §1151 within 2 months of the Supervised Sales Act, and in particular Section 1151(a), which settled the legal issue of fee lands in a reservation, holding that lands within an Indian reservation, regardless of whether they are held in trust or fee status, are under federal criminal jurisdiction and remain part of the reservation. Seymour v. Superintendent, 368 U.S. 351, 357-58 (1962). The precise issues now before this Court have been squarely addressed in Seymour, which clearly held that neither the allotment of land in a land sale act, nor the passage of title to non-Indians in fee removes land from an Indian reservation, as codified by Congress in 25 U.S.C. §1151. Id.

The United States incorrectly concludes that the Supervised Sales Act of 1948 cured title defects, and because the Tribe did not seek title to fee patent lands for patents issued after 1934, the argument regarding its effect on the reservation is waived. USB at 58. As with the State's argument based on Nichols, this is a spurious argument - the Tribe need not have standing to seek title to lands to argue the title transfer to fee status did not diminish the Yankton Reservation. See, infra, at 23-24. As the District Court had already stated, "Ownership of real property

versus reservation boundary determinations are essentially two different questions." USApp. at 4. Nothing in the 1948 Supervised Sales Act language or legislative history supports a finding that it intended to diminish the Yankton Reservation when it authorized issuance of fee patents. TB 46-48.

The County's primary strategy is to attack the credibility of the United States. However, the County asserts **for the first time** in it's Reply Brief that the Eighth Circuit did not preclude disestablishment arguments in Gaffey. CRB at 33. The State and County's disestablishment arguments are not credible and are barred by the case mandate. TB 59-61. Further, the County acknowledged at Trial that, "we are not offering the maps to circumvent in any manner the order of this Court that the reservation has not been completely disestablished . . . . I accept at face value the order of this Court entered last week, that is not an issue in this case, and I am not on behalf of the county maintaining anything different than that." T.T. 181:13-20.

CONCLUSION

The Tribe and its members have a reasonable expectation of non-interference in their relationship with each other and the federal government in the homeland they worked very hard to protect in 1892 under incredibly difficult circumstances, in spite of their lack of sophisticated understanding of land title

issues and negotiating in the English language back then, and in the face of incredible pressures. That reasonable expectation has not been enforced. For this reason, the Tribe respectfully asks this Court to protect the right of the Yankton Tribal members to govern their own affairs without interference from the State and County officials. The Tribe respectfully requests that this Court rule that the Yankton Reservation includes all nonceded lands, except for those allotments that were sold prior to 1919 because the allottee died without heirs under Article XI of the 1894 Act.

Dated this 9th day of January, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee/Cross-Appellant's Reply Brief is within the limitation provided for in Rule 28.1(e)(2)(B)(I) using Times New Roman typeface in 14 point font. Appellee/Cross-Appellant's Reply Brief contains 6,995 words.

2. I certify that the word processing software used to produce this brief is Word Perfect X3, and it is herewith submitted in PDF format.

3. I certify that the disk submitted herein with the text of the brief is virus free.

Dated this 9th day of January, 2009.

_____
Rebecca L. Kidder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Appellee/ Cross-Appellants Reply Brief and computer diskette containing said brief in the matter of Yankton Sioux Tribe, et al v. Scott Podhrasky, et al, were served upon each of the following by enclosing the same in envelopes with first class postage prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Rapid City, South Dakota, on this 9 th day of January 2009:

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