NO. 10-__

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,

PETITIONERS,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2011

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QUESTION PRESENTED

The court of appeals held in this case that land transfers by the United States Army Corps of Engineers to the State of South Dakota pursuant to the Water Resources Development Act of 1999 did not violate §§ 605(b)(3) and (c)(1)(B) of that Act because they did not include lands within the "external boundaries" of the Yankton Sioux Reservation. The petitions and conditional cross-petition for a writ of certiorari in Nos. 10-929, 10-931, and 10-932 concern the boundaries of that reservation. The question presented is whether to hold this petition and then dispose of it as appropriate in light of the Court's disposition of those other petitions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents include Pete Geren, Secretary of Army; George S. Dunlop, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert L. Van Antwerp, Chief of Engineers; David C. Press, Omaha District Commander and District Engineer; United States of America; State of South Dakota; Jeff Vonk, Secretary of the Department of Game, Fish, and Parks for the State of South Dakota; and John Does, Contractors.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 606 F.3d 895, and reproduced at Pet. App. 1-11. The unpublished order of the court of appeals denying rehearing en banc is reproduced at Pet. App. 51.

The district court's unpublished opinion granting respondents' motion for summary judgment is reproduced at Pet. App. 22-31. The district court's unpublished decision denying petitioners' motion for relief from the judgment is reproduced at Pet. App. 14-21.

JURISDICTION

The court of appeals rendered its decision on June 2, 2010, and denied a timely petition for rehearing en banc on September 23, 2010. Pet. App. 51. On December 17, 2010, Justice Alito extended the time for filing a petition for certiorari to and including February 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), requires the United States Army Corps of Engineers to transfer fee title to certain "land and recreation areas" to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses." WRDA § 605(a)(1).

Subsections 605(b) and 605(c), as amended, describe the land to be transferred as land that "is located outside the external boundaries of a reservation of any Indian tribe." WRDA §§ 605(b)(3), 605(c)(1)(B).

Subsection 607(a), as amended, states that:

> (a) IN GENERAL.—Nothing in this title diminishes or affects—
>
> (1) any water right of any Indian Tribe;
>
> (2) any other right of any Indian Tribe, except as specifically provided in another provision of this title;
>
> (3) any treaty right that is in effect on the date of enactment of this Act;
>
> (4) any external boundary of any Indian reservation of any Indian Tribe;
>
> (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or
>
> (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act….

WRDA § 607(a).

STATEMENT OF THE CASE

This is a companion case to *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), which is

the subject of three petitions for a writ of certiorari by state and local entities, as well as a conditional cross-petition by the Yankton Sioux Tribe. That case and this one turn on the same basic question: whether certain lands within the historic Yankton Sioux Reservation have lost their reservation status.

This case involves the reservation status of approximately 1,100 acres of recreational land that the United States Army Corps of Engineers ("Corps") transferred to the State of South Dakota pursuant to the Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000). The WRDA specifically limits transfers to areas "outside the external boundaries of a reservation of any Indian tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B);[1] *see also id.* § 607(a)(4). Because the relevant areas are all located within the original boundaries of the Yankton Sioux Reservation, the validity of the Army Corps' land transfer turns on whether the Yankton Sioux Reservation has been diminished to such an extent that it no longer includes these areas. That is the same question presented in *Podhradsky*.

In *Podhradsky*, the Tribe will file a brief in opposition explaining why this Court should deny review in that case, and thus ultimately deny this hold petition as well. But if this Court were to grant the petitions and conditional cross-petition in

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[1] The Eighth Circuit opinion refers to WRDA § 605(c)(2), which Congress redesignated as § 605(c)(1)(B) in the 2000 amendments.

Podhradsky, there would be no reason not to hold this petition. In that scenario, this Court's decision in *Podhradsky* would govern this case as well. Accordingly, the Court should hold this petition for *Podhradsky*, and then consider it in light of the Court's disposition of *Podhradsky*.

A. Historical Background

1. An 1858 Treaty between the Yankton Sioux Tribe and the United States established the original boundaries of the Yankton Sioux Reservation. *See* Treaty of Apr. 19, 1858 ("1858 Treaty"), 11 Stat. 743. The Tribe ceded to the United States over 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 744.

2. Three decades later, Congress changed policies in the Dawes Act or General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). The Dawes Act reflected a federal policy of opening up lands for settlement, and breaking up reservations into smaller pieces, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. *Id.* at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted. In 1894, the United States reached an agreement with the Tribe to purchase those unallotted acres for $600,000. *See* Act of Aug. 15, 1894 ("1894 Act"), ch. 290, art. 20, 28 Stat. 286, 319. The Yankton Sioux Tribe thereby surrendered approximately 168,000 acres from its 430,405-acre reservation, leaving approximately 262,300 acres of allotted lands.

In submitting the agreement to Congress, the Commissioners who had negotiated the agreement explained that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," and "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." Report of the Yankton Indian Commission (Mar. 31, 1893), S. Exec. Doc. No. 27, at 13.

To that end, the 1894 Act stipulated various conditions for the sale that reflected Congress's expectation that a reservation would persist. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. 28 Stat. at 316. Article XIII required the United States to guarantee to "[a]ll persons who have been allotted lands on the reservation" the "undisturbed and peaceable possession of their allotted lands." *Id*. And Article XIV prohibited Congress from "pass[ing]

any act alienating any part of these allotted lands from the Indians." *Id.* at 317.

4. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had duly expired, "left many Indians landless." *Podhradsky*, 606 F.3d at 1000. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "'cultural resilience.'" *Id.* at 1001. The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation held in trust. *See id.* at 1000 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than open the 1,000 acres of agency reserve lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), extended those policies. In addition to putting an end to further allotment and extending the trust periods for outstanding allotments indefinitely, the IRA authorized the Secretary of the Interior to acquire additional lands in trust to create or add to tribal reservations. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. *Podhradsky*, 606 F.3d at 1001.

B. Proceedings Below

1. The first of these related cases began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the 1858 boundaries of the reservation, sought to ensure that federal environmental protections applied to the site. This Court held that the Tribe's cession of the 168,000 acres of unallotted lands to the United States had diminished the original 1858 reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). Because the waste site lay on ceded land, the Court concluded that it was not within the diminished reservation and therefore was not subject to federal environmental regulation. *Id.* at 340, 358.

This Court did not reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court pointed to Article VIII, which required the United States to reserve lands "for agency, schools, and other purposes," 28 Stat. at 316, observing that it was "'difficult to imagine'" why Congress would have reserved such agency trust lands "'if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton*, 522 U.S. at 350 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII, which prohibited the sale of liquor on ceded lands or other lands within the reservation, "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, that case was consolidated with another one in which the Tribe contended that the reservation had been diminished only by the ceding of unallotted lands to the United States for sale to non-Indians, and that the approximately 262,300 acres of non-ceded lands and agency trust lands remained part of the reservation.

The district court agreed. Based on the text and history of the 1894 Act, the court concluded that the Yankton Sioux Reservation continued to exist after 1894. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1149-56, 1159 (D.S.D. 1998). The court further determined that the reservation consisted, in diminished form, of the agency trust lands and non-ceded lands within the original 1858 reservation boundaries. *Id.* at 1159.

The Eighth Circuit affirmed in part and reversed in part. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999). Over the State's objections, the Eighth Circuit held that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 1027. At a bare minimum, the Eighth Circuit noted, the agency trust lands — which the United States returned to the Tribe in 1929 — remained part of the reservation. *Id.* The court of appeals held, however, that allotted lands lost reservation status if and when they were sold to non-Indians. *Id.* at 1028. Both the State and the Tribe sought certiorari, with the State maintaining its total disestablishment position and the Tribe maintaining that diminishment extended only to the lands ceded in 1894. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. On remand, the district court determined that approximately 37,600 acres of trust lands within the original 1858 boundaries retained reservation status, including: (1) the agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) the lands allotted to individual Indians that remain in trust today; (3) the lands additionally taken into trust under the 1934 IRA; and (4) the lands allotted to individual Indians that are no longer in trust but are still owned in fee by Tribe members. *See Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1058 (D.S.D. 2007).

4. The same district court judge simultaneously presided over this case, in which the Tribe challenges land transfers by the U.S. Army Corps of Engineers to South Dakota under the Water Resources Development Act. *See* Pet. App. 34-50. There is no dispute that the disputed 1,100 acres of land lie within the original 1858 reservation boundaries: the 971-acre North Point Recreation Area, the 44-acre White Swan Recreation Area, and the 70-acre Spillway Recreation Area.

The Tribe argued that the lands were reservation lands and thus not subject to transfer under the WRDA, which authorizes transfer only of lands "outside the external boundaries" of Indian reservations. WRDA §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4). Both the United States and South Dakota took the position that, under the Eighth Circuit's decision in *Gaffey*, the lands at issue were outside the diminished reservation. State CA8 Br. 41-43; U.S. CA8 Br. 18-20. The United States emphasized, however, that in its view "*Gaffey* was

wrongly decided to the extent it held the reservation was diminished beyond the 1894 cession of land." U.S. CA8 Br. 9 n.4. The United States "reserv[ed] its right to seek en banc or Supreme Court review in *Gaffey/Podhradsky*." *Id.*

When the district court issued its *Podhradsky* decision, it requested supplemental briefing on whether that decision controlled the disposition of this case. *See* Pet. App. 23. Following that briefing, the district court granted summary judgment against the Tribe on the ground that "*Podhradsky* eliminates any possibility that the Tribe can prevail … in this lawsuit." *Id.* at 29. The court explained that none of the Corps-transferred lands fell within any of the categories of land that, under *Podhradsky*, "continue to fall within the" reservation. *Id.*

5. On appeal, the Eighth Circuit held this case for *Podhradsky*, largely affirmed the district court's *Podhradsky* opinion, and then affirmed the district court's decision in this case based on its decision in *Podhradsky*. *See id.* at 2; *Podhradsky*, 606 F.3d at 1017. In *Podhradsky*, the Eighth Circuit agreed with the district court that the diminished reservation includes (1) the agency trust lands, (2) the allotted lands that remain in trust, and (3) the lands taken into trust under the 1934 IRA. 606 F.3d at 1017. The court of appeals vacated the district court's holding that the reservation also includes allotted lands that are owned in fee by Indians but not held in trust, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 1015.

In this case, the Eighth Circuit then issued a short opinion affirming the district court's grant of summary judgment against the Tribe. *See* Pet. App. 1-11. The Eighth Circuit declined to delve into the parties' "core positions" — the State's argument that the reservation was wholly disestablished, and the Tribe's argument that the reservation was diminished only by the ceded lands — because "[w]e rejected those contentions in *Podhradsky*." *Id.* at 5-6. Because most of the lands at issue passed out of trust into private non-Indian hands before the Corps acquired them, the court determined that those parcels were outside the reservation's diminished boundaries at all relevant times under its decisions in *Gaffey* and *Podhradsky*. *Id.* at 7. As for the few tracts still in trust at the time the Corps acquired them, the Eighth Circuit stated that the Corps' acquisition deprived them of reservation status in the same way that acquisition of lands by any other non-Indians would deprive them of that status under *Gaffey* and *Podhradsky*. *Id.* at 9.

6. In *Podhradsky*, the State defendants, County defendants, and Southern Missouri Recycling and Waste Management District filed petitions for certiorari seeking review of the question whether the 1894 Act wholly disestablished the Yankton Sioux Reservation (Nos. 10-929, 10-931, and 10-932). The Tribe opposes those petitions, but has filed a conditional cross-petition noting that if this Court were to grant review, it should also consider the Tribe's position that the reservation has been diminished only by the ceding of unallotted lands for sale to non-Indians in 1894.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD HOLD THIS PETITION FOR THE PETITIONS AND CONDITIONAL CROSS-PETITION IN NOS. 10-929, 10-931, AND 10-932.

The Eighth Circuit "deferred [its] ruling" in this case "pending disposition of [*Podhradsky*]," and then held that this case is controlled by *Podhradsky*. Pet. App. 2; s*ee also, e.g., id.* ("We now follow our recent decision in *Yankton Sioux Tribe v. Podhradsky* … and affirm."); *id.* at 5 ("[A]pplying the diminished Reservation boundaries adopted in *Podhradsky*, we affirm."); *id.* at 6 (*Podhradsky* "is final … and binding on our panel"). The district court and the respondents have likewise acknowledged that this case and *Podhradsky* are inextricably intertwined, and that *Podhradsky* is the lead case involving the core issues. Accordingly, this Court should follow the Eighth Circuit's lead by holding this petition for *Podhradsky*, and then disposing of it in light of the Court's disposition of the petitions and conditional cross-petition in *Podhradsky*.

1. The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), limited the Corps' authority to transfer recreation areas to those areas "located outside the external boundaries of a reservation of any Indian Tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4).

As the Eighth Circuit explained, the lands at stake are "within the 1858 Reservation boundaries," but were allotted and "sold to non-Indians." Pet.

App. 6. Because "*Podhradsky* held that the Reservation now consists of allotted land that remained in trust and other trust lands, but *does not include allotted land that passed out of Indian hands,*" the Eighth Circuit concluded that none of the lands at issue in this case were within the Reservation's boundaries at the time the Army Corps transferred them to the State. *Id.* at 7 (emphasis added).

The Eighth Circuit explained that most of the lands had passed into private, non-Indian hands before the Corps acquired them, and were thus squarely controlled by *Podhradsky*. *Id*. The Eighth Circuit also noted that the United States had held a few of the other tracts in trust for the benefit of allottees at the time that the Army Corps acquired them in condemnation proceedings approximately 60 years ago, before Congress enacted the WRDA. *Id.* at 7-8. Again referring to its rationale in *Podhradsky*, the court concluded that, because transfer into the hands of the United States for unrelated purposes is passage out of trust, the lands' transfer to the Corps diminished the Reservation under the rationale of *Podhradsky*. *Id*.; *see also id.* at 10 (explaining that "the transfer from Indian ownership diminished the Reservation, regardless of the identity of the transferee").

2. The district court and the respondents have likewise emphasized that the correct disposition of this case turns on *Podhradsky*. Simultaneous with the issuance of its *Podhradsky* opinion in December 2007, the district court ordered the parties to file briefs and supporting materials on the question whether the decision in *Podhradsky* controlled this

case. *Id.* at 23. The court then ruled that "*Podhradsky* eliminates any possibility that the Tribe can prevail … in this lawsuit." *Id.* at 29.

The respondents also devoted near-singular attention to the implications of *Podhradsky* and the Eighth Circuit's earlier *Gaffey* decision. *See* State CA8 Br. 36 ("Under *Gaffey* and *Podhradsky*, the answer [to the validity of the Corps' land transfers] is simple."); U.S. CA8 Br. 36 (stating that "the transferred land left Indian hands and is subject to the holding in *Gaffey*," but that *Gaffey* was wrongly decided).

Indeed, the United States filed a motion — supported by the State — to hold this case in abeyance in the Eighth Circuit because "the ultimate disposition of *Podhradsky* may affect the outcome of this case." U.S. Motion for Abeyance at 5, dated Sept. 2, 2009; *see also* Letter from State, dated Sept. 8, 2009 (supporting U.S. Motion). The State similarly indicated in an August 28, 2009, letter that it would likely seek rehearing en banc in *Podhradsky* and the appeal in this case should be held in abeyance pending that petition. As noted above, the Eighth Circuit agreed insofar as it "deferred [its] ruling pending disposition of" *Podhradsky*. Pet. App. 2. There is no reason for this Court to take a different approach.

CONCLUSION

This Court should hold the petition and dispose of it in accordance with this Court's disposition of the petitions and conditional cross-petition in Nos. 10-929, 10-931, and 10-932.

Respectfully submitted,

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February 22, 2011

APPENDIX

TABLE OF APPENDICES

Appendix A

606 F.3d 895

United States Court of Appeals,
Eighth Circuit.

YANKTON SIOUX TRIBE, Plaintiff-Appellant,
v.
UNITED STATES ARMY CORPS
OF ENGINEERS, et al., Defendants-Appellees.
No. 08-2255.

Submitted: May 12, 2009.
Filed: June 2, 2010.

Rehearing and Rehearing En Banc
Denied Sept. 23, 2010.

Attorneys and Law Firms

Rebecca L. Kidder, argued, Charles Abourezk, on the brief, Rapid City, SD, for appellant.

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Before LOKEN, Chief Judge,* BYE, Circuit Judge, and MILLER,** District Judge.

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* The Honorable James B. Loken stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 31, 2010. He has been succeeded by the Honorable William Jay Riley.

** The Honorable Brian Stacy Miller, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Opinion

LOKEN, Chief Judge.

An 1858 treaty between the United States and the Yankton Sioux Tribe of Native Americans established the Yankton Sioux Reservation (the "Reservation"), comprising approximately 430,000 acres in what is now Charles Mix County, South Dakota, bounded on the south and west by the Missouri River. This appeal attacks the validity of land transfers by the U.S. Army Corps of Engineers to the State of South Dakota. It is resolved by our determination of the current boundaries of the Reservation. We deferred our ruling pending disposition of another appeal involving a different aspect of the long-standing dispute over the Reservation. We now follow our recent decision in *Yankton Sioux Tribe v. Podhradsky,* 606 F.3d 994, 2010 WL 1791365 (8th Cir. May 6, 2010) (*Podhradsky*), and affirm.

I.

Implementing the Dawes Act of 1887, federal agents "allotted" a substantial portion of the Reservation to individual tribal members in noncontiguous parcels. In 1892, federal Commissioners negotiated an agreement, ratified by Congress in 1894, whereby the Tribe ceded (transferred) 170,000 unallotted acres to the United States as surplus lands. Act of August 15, 1894, ch. 290, 28 Stat. 286 ("the 1894 Act"). As the 1892 agreement contemplated, the United States sold

nearly all of the ceded lands, which were interspersed with allotted lands, to non-Indian settlers.

In *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), the Supreme Court held that the Reservation was diminished by the lands ceded to the United States under the 1894 Act. However, the Court declined to determine whether Congress disestablished the Reservation altogether and remanded the case for further proceedings. *Id.* at 358, 118 S.Ct. 789. Since then, the remaining issues have been litigated in two separate lawsuits before District Judge Lawrence Piersol in the District of South Dakota and in multiple appeals to this court.

The lead case concerned the jurisdiction of the Tribe, the State of South Dakota, and the United States over non-ceded lands within the Reservation's original 1858 boundaries. Initially, we rejected the State's contention that the Reservation was disestablished by the 1894 Act, but we held that the Reservation was further diminished when allotted lands passed out of Indian ownership. *Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir.1999) ("*Gaffey*"), *cert. denied,* 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000), *rev'g in part* 14 F.Supp.2d 1135, 1159-60 (D.S.D.1998). We remanded, instructing the district court to determine what categories of land comprised the diminished Reservation. Resolving appeals from that ruling, we recently held that the diminished Reservation consists of allotted lands that remain in trust, additional lands taken into trust,

and ceded lands reserved by the 1894 Act ("agency trust lands"). *Podhradsky,* 2010 WL 1791365 at * 20, 606 F.3d at 1016-17, *rev'g in part* 529 F.Supp.2d 1040 (D.S.D.2007). The interested reader is referred to these opinions for a thorough review of the complex history and legal issues surrounding this critical part of the broad dispute.

This appeal concerns the second case arising out of the broad controversy. In the Flood Control Act of 1944, 58 Stat. 887, Congress authorized the Corps to construct dams along the Missouri River. The Corps acquired lands for this vast project by condemnation and purchase, including lands within the 1858 boundaries of the Reservation. In Title VI of the Water Resources Development Act of 1999, Congress directed the Corps to transfer to the State of South Dakota for fish and wildlife or public recreation uses specified lands "located outside the external boundaries of a reservation of any Indian Tribe" that the Corps had acquired to implement the Pick-Sloan Missouri River Basin project.[1] In this action, the Tribe seeks to nullify the sale to the State of recreation areas the Corps initially acquired for the Fort Randall Dam project in south-central South Dakota – the 971-acre North Point Recreation Area and the 44-acre White Swan Recreation Area – and the lease of the 70-acre Spillway Recreation Area. The Tribe argues

[1] Pub.L. No. 106-53, 113 Stat. 269, 391 §§ 605(b)(3), (c)(2) (1999), *as amended by* Pub.L. No. 106-541, § 540(h)(4), 114 Stat. 2572, 2670 (2000). These statutes have never been codified.

that these lands are within "the external boundaries" of the Reservation and are therefore barred from being transferred by §§ 605(b)(3) and (c)(2) of the WRDA, as amended.[2]

After first resolving the issue we remanded in *Podhradsky,* Judge Piersol granted summary judgment for the Corps and State. Noting the Tribe admitted that the Corps held title to the lands in question prior to enactment of the WRDA, Judge Piersol concluded that the lands here at issue do not fall within any of the categories of land which he determined in *Podhradsky* "continue to fall within the exterior boundaries of the checkerboard Yankton Sioux Reservation." *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs,* No. 02-4126, 2008 WL 895830 at *3 (D.S.D. Mar.31, 2008). The Tribe appeals. Reviewing the grant of summary judgment *de novo,* and applying the diminished Reservation boundaries adopted in *Podhradsky,* we affirm.

II.

Because this appeal was briefed and argued with the cross appeals pending in *Podhradsky,* the parties have understandably reiterated their core positions in

[2] We note that, in the 2000 WRDA, Congress amended § 605(d)(2)(B)(i)(II)(cc) to specifically direct the Corps to lease the Spillway Recreation Area to the State. 114 Stat. at 2666. Given our broader rejection of the Tribe's claims, we need not address whether this amendment foreclosed the specific Spillway claim.

that case, namely, the Tribe's contention that the Reservation was diminished only by the sales of surplus lands ceded by the 1894 Act (as the Supreme Court held in *Yankton Sioux Tribe*), and the State's contrary contention that the Reservation was altogether disestablished by the 1894 Act. We rejected those contentions in *Podhradsky.* That decision is final (subject only to further review by this court or the Supreme Court) and binding on our panel. Therefore, we will discuss in this opinion only those issues raised by the Tribe that were not presented to and decided by the court in *Podhradsky.*

1. The North Point, White Swan, and Spillway recreation areas here at issue consist of lands within the 1858 Reservation boundaries that were subsequently allotted to individual members of the Tribe.[3] Most parcels were then fee patented to allottees or their heirs and assigns and sold to non-Indians. *Podhradsky* held that the Reservation now consists of allotted land that remained in trust and other trust lands, but does not include allotted land that passed out of Indian hands. 2010 WL 1791365, at *20, 606 F.3d at 1016-17, applying *Gaffey,* 188 F.3d at 1030.[4]

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[3] Apparently, one 40-acre parcel was part of the lands ceded to the United States by the 1894 Act, in which case it is clearly outside the diminished Reservation.

[4] Typically, a reservation is diminished when a contiguous piece is carved out; while non-Indians may acquire title to land in the remainder, its reservation status does not change. *See Solem v. Bartlett,* 465 U.S. 463, 470-71, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). In *Gaffey,* however, we concluded that

(Continued on following page)

Thus, these fee-patented parcels were outside the Reservation's diminished boundaries *when the Corps acquired them*. The Tribe argues that *Podhradsky* decided only the jurisdictional status of these lands; they remain part of the Reservation because the Corps acquired the lands under the Flood Control Act of 1944, and we held in *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 (8th Cir.1983), that the Flood Control Act did not authorize the diminishment of any reservation. However, as the district court recognized, the diminishment here did not result from Flood Control Act acquisitions. Rather, by reason of the 1894 Act as construed in *Gaffey,* these fee-patented lands were outside the "external boundaries" of the Reservation before they were acquired by the Corps. Therefore, the Corps' subsequent transfer of these lands to the State did not violate §§ 605(b)(3) and (c)(2) of the WRDA.

The Tribe also contends that summary judgment was inappropriate because there are material issues of fact whether the Corps acquired some tracts of allotted lands from non-Indians whose titles derived from fee patents that were forced upon tribal members. Though presented as a diminishment issue, this is in fact a time-barred collateral attack on the validity of the titles the Corps acquired some sixty years ago. *See Nichols v. Rysavy,* 809 F.2d 1317 (8th

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Congress intended the Reservation to be further diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." 188 F.3d at 1030.

Cir.), *cert. denied,* 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 103 (1987). These lands were not within the Reservation when they were acquired for flood control purposes, nor when the Corps transferred them to the State.

2. A few tracts in the North Point and White Swan recreation areas were allotted land still held in trust for the benefit of allottees when they were acquired by the Corps in condemnation proceedings some sixty years ago. The record reflects that the Corps commenced condemnation proceedings in the District of South Dakota; the Bureau of Indian Affairs did not oppose condemnation but negotiated appropriate compensation for the Indian allottees; each allottee signed a Consent to Transfer of Lands acknowledging that, in exchange for specified compensation, "absolute fee title will be conveyed to the United States of America for the benefit of the War Department by court decree;" the district court then entered final condemnation orders; and the Attorney General provided the Secretary of the Army a letter opining that "valid title to the above tract is vested in the United States of America in fee simple." The Tribe concedes that the United States held fee simple title to these tracts when the WRDA was enacted and when the Corps transferred them to the State. *See Cherokee Nation v. Southern Kansas Ry. Co.,* 135 U.S. 641, 656-657, 10 S.Ct. 965, 34 L.Ed. 295 (1890) (United States may use its eminent domain powers to take Indian lands); 25 U.S.C. §§ 341, 357. Moreover, any

challenge to the takings would be time-barred. *See* 28 U.S.C. § 2401.

In *Podhradsky,* we held that allotments continuously held in trust for the benefit of the tribe or its members are part of the diminished Reservation. 2010 WL 1791365 at * 13, 606 F.3d at 1009-10. However, we held in *Gaffey* that the Reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." 188 F.3d at 1030. The Tribe argues that the district court erred in applying this ruling to the Corps' acquisition of such lands because Congress only "intended to diminish the reservation by . . . land which it foresaw would pass into the hands of white settlers and homesteaders," *id.* at 1028, not to the United States.

This argument is without merit. First, the holding in *Gaffey,* which is binding on our panel, is not so limited. Second, a member of the Tribe who had a beneficial interest in allotted land still held in trust exchanged that interest for compensation when the land was acquired by the Corps in a condemnation proceeding, just as the same interest was surrendered by an allottee who took a fee patent and sold allotted land to a non-Indian.[5] Third, the Corps' use of the

[5] The record reflects that individual tribal members were initially paid a total of $121,210 as compensation for the takings. In 1954, Congress authorized a payment of $106,500 "for the purpose of relocating the members of the Yankton Sioux Tribe, South Dakota, who reside or have resided, on tribal and

(Continued on following page)

acquired land to build a dam and reservoir, which required the relocation of eight percent of the Tribe's population, was fundamentally inconsistent with the concept of a reservation – "land set aside under federal protection for the residence or use of tribal Indians." *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii], at 189 (2005 ed.). Our decision in *Gaffey* was that the transfer from Indian ownership diminished the Reservation, regardless of the identity of the transferee. Therefore, allotted lands still held in trust became lands "located outside the external boundaries" of the Reservation when fee simple title was acquired by the Corps for the Fort Randall Dam project.[6]

III.

Finally, the Tribe appeals the district court's denial of its motion to disqualify the Department of

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allotted lands acquired by the United States for the Fort Randall Dam and Reservoir project." 43 U.S.C.A. § 1200e. In 2002, Congress placed an additional $23 million in a trust fund as compensation for the dam project. Yankton Sioux and Santee Sioux Tribes Equitable Compensation Act, Pub.L. No. 107-331, 116 Stat. 2834, 2838-2843 (2002)

[6] The Tribe also asserts that there may have been allotted land acquired by the Corps that had been continuously held in fee by tribal members, rather than non-Indians. Our decision in *Podhradsky* left open the Reservation status of lands falling in this category. 2010 WL 1791365 at *18, 606 F.3d at 1014-15. Without question, however, the Corps acquired fee title to these lands well before enactment of the WRDA.

Justice from representing the Corps. The Tribe filed this motion in May 2007, almost five years after commencement of the suit, arguing that the Department should not represent the Corps in this case because its attorneys, representing the United States in its capacity as trustee, sided with the Tribe in the *Gaffey/Podhradsky* litigation. The Tribe cites no authority for the proposition that the Attorney General may be disqualified from performing his statutory duty of representing another department of the United States in federal court. 28 U.S.C. § 516. The district court did not abuse its discretion in denying this untimely motion. *See Droste v. Julien,* 477 F.3d 1030, 1035 (8th Cir.2007) (standard of review).

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2255

Yankton Sioux Tribe, and its individual members,

Plaintiff-Appellant

v.

United States Army Corps of Engineers; Pete Geren, Secretary of the Army; George S. Dunlop, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert L. Van Antwerp, Chief of Engineers; David C. Press, Omaha District Commander and District Engineer; United States of America; State of South Dakota; Jeff Vonk, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; John Does, Contractors,

Defendants-Appellees

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:02-cv-04126-LLP)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 02, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* *

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS; PETE GEREN, Secretary of the Army; GEORGE S. DUNLOP, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT L. ANTWERP, Chief of Engineers; DAVID C. PRESS, Omaha District Commander and District Engineer; THE UNITED STATES OF AMERICA; THE STATE OF SOUTH DAKOTA; JEFF VONK, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and JOHN DOES, Contractors, Defendants.	*	CIV 02-4126 MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT UNDER RULE 60(b)(1) (Filed Apr. 21, 2009)

* *

Title to the real property in question was granted to the United States through condemnation actions in this Court over 50 years ago. Plaintiffs presently

challenge the proceedings and the title that is now vested in the United States by virtue of a Motion for Relief from Judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure, The challenge is to the substance of this Court's Memorandum Opinion and Order and Judgment of March 31, 2008.

Title to the real property in question was granted to the United States through sales and in other instances through condemnation actions in this Court over 50 years ago. It has not been shown that there were any challenges to the legality of the takings and there has been no showing of any appeals from the condemnation judgments of this Court.

Plaintiffs cannot challenge the proceedings and the resulting title that now is vested in the United States by virtue of a 60(b) Motion. Plaintiffs or their predecessors could have challenged the taking by objecting at trial and appealing from the condemnation proceedings. In *United States v. Herring,* 750 F.2d 669, 671 (8th Cir. 1984), the court stated that in cases where an issue concerning the statutory validity of the taking arises, the government is considered to have taken only a defeasible title and a party may challenge the validity of the taking on appeal. However, once the time for appeal has expired, title to the land becomes 'indefeasible' and is only subject to challenge pursuant to the Quiet Title Act of 1972, 28

U.S.C. § 2409a(a)[1]. *Id.* (stating that "title was 'defeasible' until final judgment only to the extent that it was subject to challenge by the then existing landowner as a wrongful taking."); *Block v. North Dakota,* 461 U.S. 273, 286, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983) ("Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States' title to real property."). Because Plaintiffs or their predecessors failed to bring this action within the 12-year statute of limitations provision governing Quiet Title

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[1] The Court notes that while the language of the Quiet Title Act states that it "does not apply to trust or restricted Indian lands," the United States Supreme Court has stated that this exclusion "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians. . . . 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." *United States v. Mottaz,* 476 U.S. 834, 842-43, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). In *Mottaz,* the Court found that because the United States was claiming an interest in the disputed lands not on behalf of Indian beneficiaries of a trust, but rather on behalf of the United States Forest Service and the Chippewa National Forest, the Court held the Quiet Title Act was the exclusive vehicle by which the plaintiff could judicially challenge the title of the United States to the real property in question. *Id.* at 843.

In the present case, because the United States condemned the land in question not on behalf of Indian beneficiaries of a trust, but rather for its own purposes to build a dam, Plaintiffs' claims, like those of the plaintiff in *Mottaz,* are governed by the Quiet Title Act.

Act claims, 28 U.S.C. § 2409a(g), any action under that Act is now time barred.

Legal title was vested with the United States even though the Court concludes there was never condemnation authority provided to the Army Corps of Engineers by Congress for the acquisition by condemnation of lands at issue in this case, As stated by the Eighth Circuit in *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 (8th Cir. 1983) and in *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1006 (8th Cir. 1976), the Flood Control Act of 1944, Pub.L. No. 78-534, 58 Stat. 887 (1944), did not authorize the acquisition of Indian property. However, Congress, as recognized by the court in *Lower Brule,* passed seven subsequent statutes which authorized limited takings of Indian lands for specific hydroelectric and flood control dams on the Missouri River in North and South Dakota.[2] The Court finds, however, in examining these seven statutes, that none regard the lands in question in the present case.

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[2] The seven taking statutes passed by Congress in order to construct the dams within the Missouri River Basin Project were the Fort Berthold Garrison Act, Pub.L. No. 81-437, 63 Stat. 1026 (1949); Cheyenne River Oahe Act, Pub.L. No. 83-776, 68 Stat, 1191 (1954); Standing Rock Oahe Act, Pub.L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub.L. No. 85-916, 72 Stat. 1766 (1958); Fort Randall (Lower Brule) Act, Pub.L. No. 85-923, 72 Stat. 1773 (1958); Big Bend (Lower Brule) Act, Pub.L. No. 87-734, 76 Stat. 698 (1962); and Big Bend (Crow Creek) Act, Pub.L. No. 87-735, 76 Stat. 704 (1962). *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809, 813 n.1 (8th Cir. 1983).

In addition, the Court found no other statutes authorizing the takings by condemnation of the lands in this case. The other authorities listed in Table 4[3] of the report by Army Corps of Engineers' expert, James Muhn, which were cited in the condemnation filings and district court judgments for the condemned lands, do not show, as required in *Winnebago,* 542 F.2d at 1006, the clear intent of Congress to take the tribal lands at issue by eminent domain. Additionally, the Court examined the language of the Act of July 6, 1954, Pub.L. No. 83-478, 68 Stat. 452, and found that it also did not authorize the takings of the Indian lands in question, but rather served to assist the families that had already been displaced as a result of the condemnation proceedings.

Accordingly, despite the fact that neither the Army Corps of Engineers nor any other part of the United States government ever received authorization from Congress to condemn the lands in question, the Court finds that the time for which the Tribe or any of its members or their predecessors may challenge the legality of these takings has expired. As explained above, aside from the question of the validity of the 60(b) motion, in *United States v. Herring,*

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[3] Act of April 24, 1888, 25 Stat. 94; Act of March 1, 1917, 39 Stat. 948; Act of July 16, 1918, 40 Stat. 904; Act of February 26, 1931, 46 Stat. 1421; Act of August 18, 1941, 55 Stat. 638; Act of December 22, 1944, Pub.L. 78-534, 58 Stat. 887; Act of May 2, 1946, Pub.L. 79-274, 60 Stat. 160; Act of July 31, 1947, Pub.L. 80-296, 61 Stat. 686; Act of June 25, 1948, Pub.L. 80-782, 62 Stat. 1019.

750 F.2d 669, 671 (8th Cir. 1984), the court stated that in cases where an issue concerning the statutory validity of the taking arises, the government is considered to have taken only a defeasible title and a party may challenge the validity of the taking on appeal. However, once the time for appeal has expired, title to the land becomes 'indefeasible' and is only subject to challenge pursuant to the Quiet Title Act of 1972, 28 U.S.C. § 2409a(a). There is no evidence in the record that Plaintiffs or their predecessors challenged or appealed the legality of the condemnation proceedings which vested, over 50 years ago, title to the real property in question in the United States. Accordingly, under *United States v. Herring,* 750 F.2d 669 (8th Cir. 1984) and *Block v. North Dakota,* 461 U.S. 273, 103 S.Ct, 1811, 75 L.Ed.2d 840 (1983), title to the land is only subject to challenge pursuant to the Quiet Title Act. Because Plaintiffs or their predecessors failed to bring a challenge within the 12-year statute of limitations provision governing Quiet Title Act claims, 28 U.S.C. § 2409a(g), any challenge to legal title having vested in the United States is time barred.

The conclusiveness of the condemnation proceedings only applies to title to real property. Under the teachings of *Lower Brule Sioux Tribe v. South Dakota,* 711 F.2d 809 (8th Cir. 1983) and *South Dakota v. Bourland,* 949 F.2d 984 (8th Cir. 1991), *rev'd on other grounds, South Dakota v. Bourland,* 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (citing *Lower Brule*), the condemnation proceedings did not and

could not affect reservation boundaries, Any indication to the contrary in the Memorandum Opinion and Order of March 31, 2008, is corrected by this acknowledgment. The result after that acknowledgment is, however, the same. The decision in the companion case, *Yankton Sioux Tribe v. Gaffey,* No. 98-4042 (D.S.D. filed Dec. 19, 2007), finally and fully determined the boundaries of the Yankton Sioux Reservation. (*See also* Ex. 12, the map which designates the reservation areas.)[4] The real property in question here was not a part of the checkerboard boundaries of the Yankton Sioux Reservation, That case, which is now on appeal, was fully litigated with all parties being represented by counsel. The Plaintiff Yankton Sioux Tribe urged a far larger reservation than was the result. That result cannot be re-litigated here by a 60(b) motion. Before the decision in the present case, the parties in the present case were asked to comment to the Court on the impact of the Gaffey decision upon the present case.

The real estate at issue in the present case was also under consideration for purposes of Yankton Sioux reservation exterior boundary determinations in *Yankton Sioux Tribe v. Gaffey,* 14 F.Supp.2d 1135, 1159 (D.S.D. 1998), *rev'd on other grounds, Yankton Sioux Tribe v. Gaffey,* 188 F.3d 1010 (8th Cir. 1999). The result in the present case is the same as

[4] The map is approximately 38 inches by 48.5 inches and because of its size and composition, smaller copies were sent as a part of the appeal record.

previously ruled on in *Yankton Sioux Tribe v. Gaffey,* No. 98-4042 (D.S.D. filed Dec. 19, 2007) and Doc. 427 in that real estate which is at issue in the present lawsuit is not within the checkerboard reservation which is what remains of the Yankton Sioux Reservation. All parties were represented in that litigation which determined reservation boundaries, and not legal title.

There were other claims raised in the 60(b) motion which are simply not part of the remaining claims in the Third Amended Complaint and are not properly the subject of a 60(b) motion.

For the foregoing reasons, it is hereby ORDERED that Plaintiffs' Motion to Alter Judgment, Doc. 356, be DENIED.

Dated this 21st day of April, 2009.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Shelly Margulies
Deputy

Appendix C

2008 WL 895830

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE, and its
individual members, Plaintiffs,
v.
UNITED STATES ARMY CORPS OF ENGINEERS;
Pete Geren, Secretary of the Army; George S. Dunlop,
Principal Deputy Assistant Secretary of the Army
for Civil Works; Robert L. Antwerp, Chief of
Engineers; David C. Press, Omaha District
Commander and District Engineer; The United
States of America; The State of South Dakota;
Jeff Vonk, Secretary of the Department of Game,
Fish and Parks for the State of South Dakota;
and John Does, Contractors, Defendants.

No. CIV 02-4126.
March 31, 2008.

Attorneys and Law Firms

Charles T. Abourezk, Abourezk & Zephier, PC, Rapid City, SD, Mario Gonzalez, Oglala Sioux Tribe, Rapid City, SD, for Plaintiff.

Jan L. Holmgren, U.S. Attorney's Office, Sioux Falls, SD, for Federal Defendants.

Charles D. McGuigan, John P. Guhin, Meghan N. Dilges, Attorney General of South Dakota, Pierre, SD, for State Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

LAWRENCE L. PIERSOL, District Judge.

All parties filed summary judgment motions. (Docs. 284, 288 and 292.) The motions have been fully briefed and the Court heard oral argument on the motions on October 9, 2007. During the hearing, the Court advised the parties that the summary judgment motions would be taken under advisement and the trial date would be cancelled. The Court also ordered supplemental briefing on the Plaintiffs' claim regarding the Visitor's Center. Following the issuance of a Memorandum Opinion and Order on December 19, 2007, in a related case, *Yankton Sioux Tribe v. Podhradsky,* CIV 98-4042 (D.S.D.), the Court allowed the parties in this case an opportunity to explain their views on whether the Court's decision in CIV 98-4042 affects the pending summary judgment motions. For the reasons set forth below the Plaintiffs' motion will be denied, the United States Army Corps of Engineers ("the Corps"), Pete Green, George Dunlop, Robert Antwerp, David Press, The United States of America's ("the Federal Defendants") summary judgment motion will be granted, and the State of South Dakota, and Jeff Vonk's ("the State Defendants") summary judgment motion will be granted.

I. BACKGROUND

The original Complaint in this action contained two distinct types of claims: one alleging violations of

the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, involving the inadvertent discovery of human remains; and one involving the transfer of lands from the United States Government to the State of South Dakota pursuant to Title VI of the Water Resources Development Act ("WRDA"), Pub.L. No. 106-53, 113 Stat. 269 (1999), as amended by Pub.L. No. 106-541, § 540,114 Stat. 2572 (2000). Following several Court hearings, the NAGPRA claims were resolved, leaving the Title VI land transfers to be resolved in this action.

The current complaint is the Third Amended Complaint, Doc. 326. The Yankton Sioux Tribe ("the Tribe") alleges the Federal Defendants violated Sections 605(b)(3) and 605(c) of WRDA by transferring the White Swan Recreational Area, the North Point Recreational Area, the Visitor's Center and by leasing the Spillway Recreational Area to the State of South Dakota, because those lands are located within the exterior boundaries of the Yankton Sioux Reservation. The Tribe admits in their current complaint that "The Army Corps of Engineers held title to the lands from the time they were acquired from their original Indian owners up to the enactment of Title VI by Congress." (Doc. 326 at ¶ 31.) The Tribe alleges the Federal Defendants acted in excess of the statutory authority granted by Congress, and as an administrative agency and officers of such agency, their actions are reviewable under the Administrative Procedures Act ("the APA"), 5 U.S.C. § 707(2)(A) and

(C). In the Prayer for Relief, the Tribe seeks a declaration, pursuant to 28 U.S.C. § 2201, that the transfer and leasing of the lands set forth above violated WRDA, and are, therefore, null and void. Another declaration the Tribe seeks is that the transfer and leasing did not remove these lands from the exterior boundaries of the Yankton Sioux Reservation. Mandamus relief is also requested, to require the Federal Defendants to cancel all deeds transferring the lands at issue and the lease of the Spillway Recreation Area. Injunctive relief, prohibiting the Federal Defendants from transferring any further Corps of Engineers' land to the State on the properties at issue in this action, is also sought by the Tribe. An award of reasonable attorney's fees, expert witness fees and costs, is sought under the Equal Access to Justice Act, 28 U.S.C. § 2412.

The Federal Defendants deny their actions violated WRDA. They deny the Visitor's Center was transferred to the State. Rather, the Corps retained the Visitor's Center because it is necessary for the Corps operation of the Fort Randal Dam. The Federal Defendants contend leasing land is not subject to the same prohibition land transfers are subject to under WRDA, which is that land is not to be transferred if it is within the exterior boundary of an Indian reservation. As far as reviewing agency action, the Federal Defendants contend the subsection of the APA that is applicable to the Court's review of the Corps' actions is 5 U.S.C. § 706(2)(A), which provides the Court shall, " . . . hold unlawful and set aside agency action,

findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Because the exterior boundaries of the Yankton Sioux Reservation were unclear at the time WRDA was enacted, the Federal Defendants sought input from various sources to assist them in making the determination of whether they had the authority to transfer the lands at issue in this action. They contend after receiving input from all relevant sources, including the Tribe, the decision was made that the lands at issue were not within the exterior boundaries of the Yankton Sioux Reservation and the White Swan Recreation Area and the North Point Recreation Area were transferred to the State.

In response to the Federal Defendants' summary judgment motion, the Tribe contends the proper subsection of the APA to be applied in this case is 5 U.S.C. § 706(2)(C), which provides that the Court shall " . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" The Tribe admits "the 1858 boundaries may not have full effect," but then contends "the Reservation retains the Missouri River as its southern exterior boundary, especially where the lands at issue are concerned." (Plaintiffs' Response, Doc. 313 at p. 5.)

The State Defendants contend in their summary judgment materials that res judicata bars this action and that the Eighth Circuit was wrong in deciding the case of *Yankton Sioux Tribe v. Gaffey,* 188 F.3d

1010 (8th Cir.1999), which action was remanded to this Court. A Memorandum Opinion and Order was issued December 19, 2007 on the remand. *See Yankton Sioux Tribe v. Podhradsky,* CIV 98-4042 (D.S.D.) (Memorandum Opinion and Order, Doc. 427).

Addressing the State Defendants' res judicata arguments, the Tribe contends a final judgment has not been issued in the *Gaffey* case and thus, cannot bar the present action on the grounds of res judicata.

II. DISCUSSION

A. Motion for Summary Judgment

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing a motion for summary judgment, this Court views the evidence in a light most favorable to the non-moving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). *"Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and 'by affidavit or otherwise' designate 'specific facts showing that there is a genuine issue for trial.'" Commercial Union Ins. Co. v. Schmidt,* 967 F.2d 270, 271 (8th Cir.1992) (quoting Fed.R.Civ.P. 56(e)).

After the summary judgment motions were filed and briefed and taken under advisement, the Court issued a decision in the related *Podhradsky* case. CIV 98-4042 (Memorandum Opinion and Order, Doc. 427). A Declaratory Judgment was entered in the *Podhradsky* case, declaring as follows:

> [T]he Court declares the following categories of land within the original 1858 treaty boundaries of the Yankton Sioux Reservation remain part of the reservation and are Indian country under 18 U.S.C. § 1151(a):
>
> > a) land reserved to the federal government in the Act of Aug. 15, 1894, Ch. 290, 28 Stat. 286, 314-19, and then returned to the Yankton Sioux Tribe;
> >
> > b) land allotted to individual Indians that remains held in trust;
> >
> > c) land taken into trust under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-77); and
> >
> > d) Indian owned fee land that has continuously been held in Indian hands.

Podhradsky, CIV 98-4042 (Judgment, Doc. 429, Dec. 19, 2007). The Court denied the Tribe's other claims in *Podhradsky* about additional lands continuing to be within the exterior boundaries of the Yankton Sioux Reservation, including the Tribe's claim at trial that the Reservation retains the Missouri River as its southern exterior boundary.

The Court finds regardless of which standard of review applies to the Federal Defendants' actions in this case, the decision in *Podhradsky* eliminates any possibility that the Tribe can prevail on the remaining cause of action in this lawsuit, Count One in its Third Amended Complaint, Doc. 326. As the Court mentioned above, the Tribe admitted in its Third Amended Complaint that: "The Army Corps of Engineers held title to the lands from the time they were acquired from their original Indian owners up to the enactment of Title VI by Congress." (Doc. 326 at ¶ 31.) Accordingly, the land at issue in this action does not fall within any of the four categories of land which the Court held in *Podhradsky, supra,* continue to fall within the exterior boundaries of the checkerboard Yankton Sioux Reservation. Moreover, the parties' dispute about whether the Spillway Recreation Area and the Visitor's Center were transferred to the State is now moot. Even if these two areas were transferred to the State, which the Court does not find they were, those lands are not within any of the four categories of land the Court held in *Podhradsky, supra,* are within the exterior boundaries of the Yankton Sioux Reservation.

Based upon the above discussion, there is no genuine issue of material fact remaining for trial on Count One of the Third Amended Complaint, the sole cause of action remaining in this lawsuit. Therefore, summary judgment will be granted to the State Defendants and the Federal Defendants.

B. Motion to Stay

Plaintiffs move the Court to stay the disposition of the pending summary judgment motions until such time as the appellate process in the *Podhradsky,* CIV 98-4042 (D.S.D.) case has been completed. Although the Court acknowledges the *Podhradsky* decision by this Court is subject to review by the Eighth Circuit Court of Appeals and the Supreme Court, the Court does not find the interests of justice require this Court to stay the disposition of the pending summary judgment motions. This action has been pending for nearly six years and based upon the Court's decision in *Podhradsky, supra,* Plaintiffs cannot prevail in this lawsuit. The record does not show that the property in question was anything other than Corps property when it was transferred to the State of South Dakota. Accordingly, the Court will not exercise its discretion to grant a stay in this action. *See Contracting Northwest, Inc. v. City of Fredericksburg, Iowa,* 713 F.2d 382, 387 (8th Cir.1983) *(recognizing that federal courts have the inherent power to issue a stay when the interest of justice so require). Accordingly,*

IT IS ORDERED:

1. That the State Defendants' Motion for Summary Judgment, Doc. 284, is granted.

2. That the Plaintiffs' Motion for Summary Judgment, Doc. 288, is denied.

3. That the Federal Defendants' Motion for Summary Judgment, Doc. 292, is granted.

4. That the following pending motions, Docs. 238, 242, 243, 247, are denied as moot.

5. That Plaintiffs' Motion to Stay Disposition of Summary Judgment ruling, Doc. 340, is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* *

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS; PETE GEREN, Secretary of the Army; GEORGE S. DUNLOP, Principal Deputy Assistant Secretary of the Army for Civil Works; ROBERT L. ANTWERP, Chief of Engineers; DAVID C. PRESS, Omaha District Commander and District Engineer; THE UNITED STATES OF AMERICA; THE STATE OF SOUTH DAKOTA; JEFF VONK, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and JOHN DOES, Contractors, Defendants.	*	CIV 02-4126 JUDGMENT (Filed Mar. 31, 2008)

* *

In accordance with the Memorandum Opinion and Orders dated September 30, 2004, Doc. 164; September 30, 2005, Doc. 185; and December 13,

2006, Doc. 205; and the Memorandum Opinion and Order filed this date with the Clerk,

> IT IS ORDERED, ADJUDGED and DECREED that Judgment is entered in favor of all Defendants and against Plaintiffs on all of the claims in this action.

Dated this 31st day of March, 2008.

BY THE COURT:

/s/ Lawrence L. Piersol
Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Shelly Margulies
Deputy

Appendix D

396 F.Supp.2d 1087

United States District Court,
D. South Dakota,
Southern Division.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs,
v.
UNITED STATES ARMY CORPS OF ENGINEERS; Les Brownlee, Acting Secretary of the Army; John Paul Woodley, Jr., Acting Principal Deputy Assistant Secretary of the Army for Civil Works; Robert E. Flowers, Chief of Engineers; Curt F. Ubbelohde, Omaha District Commander and District Engineer; The United States of America; The State of South Dakota; John Cooper, Secretary of the Department of Game, Fish and Parks for the State of South Dakota; and John Does, Contractors, Defendants.

No. CIV. 02-4126.
Sept. 30, 2005.

Attorneys and Law Firms

Charles T. Abourezk, Abourezk & Zephier, PC, Rapid City, SD, for Plaintiffs.

Jan L. Holmgren, Michael E. Ridgway, U.S. Attorney's Office, Sioux Falls, SD, for Defendants.

John P. Guhin, Charles D. McGuigan, Attorney General's Office, Pierre, SD, for Defendants State of South Dakota; John Cooper.

Opinion

MEMORANDUM OPINION AND ORDER

PIERSOL, Chief Judge.

After the Court allowed the Plaintiff Yankton Sioux Tribe ("the Tribe") to file a Second Amended Complaint, Defendants filed a joint Motion to Dismiss, Doc. 180. The motion has been fully briefed and will be decided based upon the written record.

BACKGROUND

The original Complaint in this action contained two distinct types of claims: one alleging violations of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.,* involving the inadvertent discovery of human remains; and one involving the transfer of lands from the United States Government to the State of South Dakota pursuant to Title VI of the Water Resources Development Act ("WRDA"), Pub.L. No. 106-53, 113 Stat. 269 (1999), *as amended by* Pub.L. No. 106-541, § 540, 114 Stat. 2572 (2000). Following several Court hearings and the appointment of a Special Master, the NAGPRA claims were resolved, leaving the Title VI land transfers to be resolved in this action.

The claims in the Second Amended Complaint relate primarily to the land transfers. In Count One, the Tribe contends that the federal Defendants violated the WRDA by transferring the White Swan and North Point Recreations Areas to the State because

those lands are within the Yankton Sioux Reservation. Count Two alleges that the transfers were completed after the January 1, 2002, deadline in the WRDA, making the transfers unlawful. In Count Three, the Tribe contends that the federal Defendants violated WRDA by failing to develop and implement clear and concise policies and procedures to ensure all requirements of NHPA would continue to be met and that they failed to take adequate steps to ensure the federal Defendants would have the ability to enforce NAGPRA, the Archeological Resources Protection Act ("ARPA"), and the National Historic Preservation Act ("NHPA") on the transferred lands. Count Four alleges a violation of § 110 of NHPA for failure to locate, inventory and nominate for inclusion on the National Register, cultural items and property within White Swan, North Point and other lands.

The relief requested in the Second Amended Complaint includes declaratory, mandamus and injunctive relief. The Tribe seeks a declaration that the transfer of the White Swan and North Point recreational areas are null and void because those lands are within an Indian reservation and the transfer was made too late. It seeks a further declaration that the transfer of these lands to the State could not remove these lands from the exterior boundaries of the Yankton Sioux Reservation. Mandamus relief is requested to cancel all deeds transferring land to the State pursuant to WRDA. Both declaratory and mandamus relief are requested to require the federal Defendants to devise and implement a concise and

practical plan to continue to comply with NAGPRA, ARPA and NHPA. Mandamus relief is requested to require Defendant United States Army Corps of Engineers to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within North Point and other lands the Tribe claims are at issue in this action. The final relief requested is an injunction to stop all construction activities on the transferred lands and to prevent any additional transfers of land to the State.

In their Motion to Dismiss, Defendants contend that the Tribe lacks standing to pursue the claims in its Second Amended Complaint and that some of the claims must be dismissed as moot, requiring dismissal of the Tribe's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction. Defendants contend the Tribe has not articulated any concrete and particularized, actual or imminent injury to a legally protected interest and, thus, there is no case or controversy cognizable in this Court. According to Defendants, the land transferred to the State under WRDA was not within the boundaries of the Yankton Sioux Reservation. As to the claim regarding the late transfer under WRDA, Defendants contend the Tribe was not harmed by the late transfer and, thus, was not within the "zone of interest" to be protected by the statute. Defendants allege that only the State could have been harmed by the late transfer of title. Additionally, Defendants claim that Count Two must be dismissed under Rule 12(b)(6) for

failure to state a claim upon which relief may be granted and that Count Four must be dismissed because the Tribe failed to exhaust administrative remedies.

DISCUSSION

In considering a motion to dismiss, the Court must assume all facts alleged in the complaint are true, *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir.1994), and the complaint is to be viewed in the light most favorable to the non-moving party, *Frey v. Herculaneum,* 44 F.3d 667, 671 (8th Cir.1995). "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Id.* (citations and quotation marks omitted). If the Plaintiff lacks standing, the Court is without subject matter jurisdiction and is required to dismiss this action. *See Faibisch v. University of Minnesota,* 304 F.3d 797, 801 (8th Cir.2002).

A. Count One

"In order to satisfy Article III's standing requirements, [Plaintiff] must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct and (3) likely to be redressed by the proposed remedy." *Starr v. Mandanici,* 152 F.3d 741, 748-49 (8th Cir.1998). "The injury must be 'concrete and particularized,' not 'conjectural' or 'hypothetical,' and

'must affect the plaintiff in a personal and individual way.'" *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 & n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "In other words, the injury must be beyond that shared in substantially equal measure by all or a large class of citizens." *Id.* (quotation marks and citations omitted).

In this case, the Tribe alleges that the land transferred to the State pursuant to WRDA included lands that "are located within the exterior boundaries of the Yankton Indian Reservation, and in which the Yankton Sioux people continue to own legally-protected interests." (Second Amended Complaint, ¶ 1.) In contrast, the Defendants contend that the North Point Recreation Area and the White Swan area are not within the exterior boundaries of the Yankton Sioux Reservation.

At this stage of the proceedings, it appears that whether the lands are within the Yankton Sioux Reservation is the primary issue under Count One because the WRDA provides that the land to be transferred under § 605(b), is land that:

> (1) is located above the top of the exclusive flood pool of the Oahe, Big Bend, Fort Randall, and Gavin's Point projects of the Pick-Sloan Missouri River Basin program;
>
> (2) was acquired by the Secretary for the implementation of the Pick-Sloan Missouri River Basin program;

> (3) *is located outside the external boundaries of a reservation of an Indian Tribe*; and
>
> (4) is located within the State of South Dakota.

WRDA, § 605(b) (emphasis added). Thus, if the transferred land is within the external boundaries of the Yankton Sioux Reservation, it appears that land should not have been transferred under WRDA § 605(b). The Court notes that the status of the Yankton Sioux Reservation and its boundaries is currently pending before the Court in another matter, *Yankton Sioux Tribe v. Gaffey,* CIV 98-4042 (D.S.D.). But for purposes of the motion to dismiss, since the Tribe is the non-moving party, the Court must accept as true the Tribe's allegations that the transferred lands are within the exterior boundaries of the Yankton Sioux Reservation and that the transfer to the State of South Dakota caused injury to Plaintiff's legally-protected interests in those lands. Thus, the Tribe has established for purposes of the motion to dismiss that it has suffered an injury in fact that is fairly traceable to the transfer of lands pursuant to WRDA, which would likely be redressed by voiding the transfers. Count One, therefore, will not be dismissed.

B. Count Two

The claim in Count Two is that because the transfer of lands was completed *after* the deadline set forth in the statute, the Secretary was divested of authority to complete the transfers, thereby making

the transfers null and void. The statute provides: "DEADLINE FOR TRANSFER OF RECREATION AREAS. . . . [T]he Secretary shall transfer recreation areas not later than January 1, 2002." WRDA, § 605(a)(1)(B), *as amended by* Pub.L. 106-541(d)(1)(C). Defendants contend that the Tribe lacks standing to pursue this claim because it was not within the zone of interest to be protected by this statute and they also seek a dismissal of this claim under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Rule 12(b)(6) argument advanced by Defendants is that the transfers are not void as the Secretary was not divested of authority to complete the transfers despite the failure to complete the transfers before the deadline in the statute.

In *Crow Creek Sioux Tribe v. Brownlee,* 331 F.3d 912, 915 (D.C.Cir.2003), the court stated:

> In order to allow time for briefing and argument on the transfer issue, the district court, pursuant to agreement of the parties, ordered South Dakota not to accept title to the recreation areas until February 8, 2002. . . . As a result, the Corps transferred title to the recreation areas to South Dakota on February 8, 2002.

This explains why the transfer was late by 38 days.

The Sixth Circuit recognized that, "[t]he Supreme Court has held that courts are not to assume that an agency has lost jurisdiction merely because it has not acted within a statutorily specified time limit."

Friends of Crystal River v. United States Envtl. Prot. Agency, 35 F.3d 1073, 1080 (6th Cir.1994) (citing *General Motors Corp. v. United States,* 496 U.S. 530, 542, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990); *Brock v. Pierce County,* 476 U.S. 253, 258-62, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986)). If there is a consequence provided in the statute for the agency's failure to comply with the statutorily specified time limit, however, "the agency will lose jurisdiction to act." *Id.* (citing *Fort Worth Nat'l Corp. v. Federal Sav. & Loan Ins. Corp.,* 469 F.2d 47, 58 (5th Cir.1972) (noting that a statutory time period is mandatory if the statute "both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.")).

The statute contains the directive that the Secretary "shall" transfer the lands by the deadline, but the Supreme Court has held that "the mere use of the word 'shall' in [a statute requiring agency action], standing alone, is not enough to remove the [agency's] power to act after [the statutorily specified time limit]." *Brock v. Pierce County,* 476 U.S. 253, 262, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986.) Despite the addition of a specific deadline, Congress did not delete the original transfer deadline provided in § 605(e)(2), which provides that, "[a]ll land and recreation areas shall be transferred not later than 1 year after the full capitalization of the Trust Fund described in section 603." Moreover, Congress did not provide any

type of consequence for failure to transfer the lands by January 1, 2002.

The cases cited by the Tribe in opposition to Defendants' argument that the Corps was not divested of authority to transfer the lands after the statutory deadline are inapposite. None of the cases involved agency action explicitly authorized by Congress that was completed after the expiration of a statutorily specified time limit. For example, *Royal Indemnity Co. v. United States,* 313 U.S. 289, 294, 61 S.Ct. 995, 85 L.Ed. 1361 (1941), involved an issue of whether the authority to act by an agency could be *implied* from a statute. Likewise, *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 740 (8th Cir.2001), involved a question of whether a subordinate officer in an agency could abandon Government property without congressional authorization. In *United States v. City and County of San Francisco,* 112 F.Supp. 451, 453 (N.D.Cal.1953), the district court considered whether an agency official had authority to execute an agreement with the defendant, a private contractor. The United States Court of Federal Claims considered in *Karuk Tribe of California v. United States,* 41 Fed.Cl. 468, 471 (Fed.Cl.1998), whether an Indian tribe was entitled to just compensation for a taking of land that the executive branch had turned over to the tribe, where Congress had not authorized such disposition. The issue in *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.,* 277 F.2d 308, 313 (9th Cir.1960), was whether an Army official had authority to relinquish title to a wrecked helicopter. The above cases involve

questions of whether an agency of the United States was ever authorized by Congress to take the action it took. In this case, Congress explicitly delegated to the Secretary the authority to transfer the lands to the State. Moreover, the cases cited by the Tribe do not involve tardy agency action and whether the agency is divested of jurisdiction to act after the expiration of a time period established by Congress.

The Tribe cites *United States v. Board of Com'rs of Fremont County,* 145 F.2d 329, 330 (10th Cir.1944), for the proposition that Congress has the exclusive right to "designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer[.]" The Court does not disagree with this statement of the law, but it does not address the issue presented in this case of whether the Corps' failure to complete the transfers before the deadline divested it of the authority to complete the transfers. The one case cited by the Tribe that relates to tardy agency action does not compel the result advocated by the Tribe. *See Gold v. The Confederated Tribes of the Warm Springs Indian Reservation,* 478 F.Supp. 190, 198 (D.Or.1979). The district court in *Gold* found that the Bureau of Indian Affairs ("BIA") lost authority to adopt a plan for distribution of a judgment fund, but that authority was not lost *solely* due to failure to comply with a statutory time limit. *See id.* Rather, the BIA failed to afford statutory procedural protections to 321 tribal members. *See id.* The district court stated an elapse of 270 days from when the plan was

due to Congress and the elapse of five years since Congress had appropriated the money to pay the judgment were additional reasons for divesting the BIA of authority to act, and notably the district court did not cite any authority for the proposition that tardy agency action *alone* would divest the BIA of authority to act. *Cf. Brock,* 476 U.S. at 266, 106 S.Ct. 1834 (holding that a statutory provision that an agency "shall" perform certain functions within a prescribed period "does not, standing alone, divest the [agency] of jurisdiction to act after that time."). In contrast to the cases cited by the Tribe, the cases cited by Defendants specifically address an agency's power to act after the expiration of a statutory time limit.

Based upon the above discussion of case law, the Court finds that the failure to transfer the lands until 38 days after the statutorily prescribed time period did not divest the Secretary of authority to complete the land transfers authorized by the WRDA. Congress explicitly authorized the Secretary to transfer the lands at issue and Congress did not provide any consequences in the statute for failure to comply with the deadline in the statute. *See Fort Worth Nat. Corp. v. Federal Sav. and Loan Ins. Corp.,* 469 F.2d 47, 58 (5th Cir.1972) (recognizing that "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision."). Thus, Count Two of the Second Amended Complaint fails to state a

claim upon which relief may be granted and it will be dismissed with prejudice.

C. Count Three

The Tribe contends in Count Three that the Corps has failed to "take adequate steps to insure that it maintains and will continue to maintain the same practical ability to enforce the provisions of NAGPRA, ARPA and the NHPA on the transferred Pick-Sloan Program lands that it had prior to the transfer of these lands." (Second Amended Complaint, ¶ 65.) Violations of the Administrative Procedure Act and WRDA are asserted as a result of federal Defendants' alleged failure to devise and implement "a concise and practical plan to insure that the United States can continue to comply with its obligations under [NAGPRA, ARPA and NHPA]." (*Id.* at ¶ 67.)

Defendants assert that the Tribe lacks standing to pursue Count Three because it has failed to allege an injury that is concrete and particularized and sufficiently imminent or actual, rather than conjectural and hypothetical. *See Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130 (explaining the elements of the constitutional minimum of standing). Count Three is not targeted at any present, ongoing violation of NAGPRA, ARPA or NHPA. In addition, Defendants contend that the Tribe has failed to establish the existence of a causal connection between the alleged failure to develop a plan to comply with NAGPRA, ARPA and NHPA on the transferred lands and the

complained of conduct of transferring the lands under the WRDA. Rather, as recognized by the court in *Brownlee,* 331 F.3d at 917-18, "any lack of federal enforcement would be traceable not to the challenged land transfer, but rather to the Secretary's failure to fulfill his continuing statutory duties under the cultural protection statutes."

The Court agrees with the *Brownlee* court that if the federal Defendants fail to comply with their duties under NAGPRA, ARPA or NHPA, such failure would not be traceable to the challenged land transfer. *See id.* Moreover, the Tribe has not cited to any statutory or constitutional requirement that the federal Defendants devise and implement "a concise and practical plan" to comply with NAGPRA, ARPA or NHPA, despite the desirability of such a plan. Thus, the Court does not find that the Tribe has satisfied its burden to show it has suffered an injury in fact that is not conjectural and hypothetical relating to the alleged failure to devise and implement a plan to comply with the cultural resource protection statutes at issue in Count Three. Count Three will be dismissed without prejudice.

D. Count Four

In Count Four, the Tribe alleges a violation of § 110 of NHPA for failure to locate, inventory and nominate for inclusion on the National Register, items and property within White Swan, North Point and other lands "that appear to qualify for inclusion

in the National Register." (Second Amended Complaint, Doc. 165, ¶¶ 70-71.) Defendants move to dismiss this claim on two grounds: (1) the claim is moot because a Cultural Resources Management Plan ("the Plan") for Lake Francis Case, including the North Point and White Swan Recreation Areas, has been adopted, which satisfies the Corps' obligations under Section 110 of the NHPA; and (2) the Tribe has failed to exhaust its administrative remedies with regard to the nomination of sites to the National Register of Historic Places ("the National Register").

The Tribe's responses to Defendants' arguments regarding Count Four are: (1) the Plan does not meet the standards under the NHPA to ensure the protection of cultural resources; and (2) this Court has subject matter jurisdiction under 28 U.S.C. § 1361, providing for subject matter jurisdiction over causes of action in the nature of mandamus.

The Court need not consider the issue of whether the Plan satisfied the Corps' obligations under Section 110 of the NHPA. Rather, this claim will be dismissed for failure to exhaust administrative remedies. Although the Court has the authority to grant mandamus relief under 28 U.S.C. § 1361, the Tribe is not excused from exhausting its administrative remedies under that statute.

In a prior lawsuit, the Tribe attempted to pursue claims similar to those in Count Four. *See Yankton Sioux Tribe v. United States Army Corps of Engineers,* 194 F.Supp.2d 977, 990-94 (D.S.D.2002). The claims

were dismissed without prejudice because they were not ripe for review and the Yankton Sioux Tribe had not exhausted its administrative remedies. As the Court recognized in the prior case, "[t]he NHPA does not *require* the Tribe to exhaust its administrative remedies prior to seeking judicial review. *See* 16 U.S.C. § 470a(a)(5)." *Id.* at 992 (emphasis in original). Thus, the Court has the discretion to determine whether the action should be dismissed for failure to exhaust administrative remedies. *Id.* (citing *Missouri v. Bowen,* 813 F.2d 864, 871 (8th Cir.1987); *McCarthy v. Madigan,* 503 U.S. 140, 144, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) (superseded by statute on other grounds) (recognizing that where Congress has not mandated exhaustion of administrative remedies, "sound judicial discretion governs" the exhaustion inquiry)). The Eighth Circuit explained the exhaustion doctrine:

> The basic concept underlying the requirements of the exhaustion doctrine is that of judicial economy. Encouraging exhaustion serves to avoid premature interruption of the administrative process by allowing an agency to apply its special expertise, to discover and correct errors, and to develop a factual background on the issue in question. Moreover, requiring exhaustion discourages the "frequent and deliberate flouting of the administrative process."

Bowen, 813 F.2d at 871 (citations omitted).

The Tribe has not alleged that the Corps has taken final action regarding any particular cultural

property. Moreover, the Tribe has not asserted that it has exercised its statutory right to appeal the Corps' failure to nominate any particular property for inclusion on the National Register. *See* 16 U.S.C. § 470a(a)(5) (providing that any person may appeal to the Secretary of the Interior a nominating authority's refusal to nominate a property for listing on the National Register). The Secretary of the Interior makes the final administrative decision on the issues of whether a property is included on the National Register, and the Tribe has not established that it has given the Secretary, through a proper administrative appeal, the opportunity to decide whether any particular property is eligible for listing on the National Register. Based upon the Tribe's allegations in the Second Amended Complaint, the Court's intervention in the administrative process would be premature and Count Four will be dismissed without prejudice. Accordingly,

CONCLUSION

Count One of the Second Amended Complaint will not be dismissed. The remaining counts, however, will be dismissed. Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss, Doc. 180, is denied as to Count One, is granted with prejudice as to Count Two, and is granted without prejudice as to Counts Three and Four.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-2255

Yankton Sioux Tribe, and its individual members

Appellant

v.

United States Army Corps of Engineers, et al.

Appellees.

Appeal from U.S. District Court for the
District of South Dakota – Sioux Falls
(4:02-cv-04126-LLP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Wollman did not participate in the consideration or decision of this matter.

September 23, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans