UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-2217

COUNTY OF CHARLES MIX,
Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, LARRY ECHO HAWK, in his official capacity as Assistant Secretary of Indian Affairs, MICHAEL BLACK, in his official capacity as Regional Director, Great Plains Region, BEN KITTO, in his official capacity as Superintendent of the Yankton Agency, and YANKTON SIOUX TRIBE,
Appellees.

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

THE HONORABLE ROBERTO A. LANGE
United States District Court Judge

BRIEF OF APPELLANT COUNTY OF CHARLES MIX

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

The Tribe's Business and Claims Committee enacted a resolution asking that the BIA accept the Travel Plaza in trust. AR002651. Even though the Tribe's resolution stated that the action was appropriate, the Tribe's governing documents make clear that most of the authority of the Tribe is reserved to a general council, consisting of all tribal members present at designated meetings. A general meeting for this purpose was not convened.

The County and the State submitted written opposition to the application. The Superintendent issued a letter decision approving the transfer of the Travel Plaza into trust, the Regional Director affirmed the decision of the Superintendent in a letter decision and the Interior Board of Indian Appeals issued a letter decision on April 30, 2009, affirming the acceptance of the 39-acre Travel Plaza in trust.

On June 22, 2010, the County filed suit in the District Court of South Dakota, Central Division. On March 31, 2011, the District Court filed its opinion. The District Court denied Summary Judgment for Plaintiff, County of Charles Mix, and granted Summary Judgment for Defendants. County of Charles Mix filed a timely notice of Appeal to this Court on June 1, 2011.

The County of Charles Mix requests ten minutes for presentation of oral argument.

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JURISDICTIONAL STATEMENT

After a final agency decision was issued on June 11, 2010, the County of Charles Mix ("County") filed a Complaint in the United States District Court, District of South Dakota. County Appendix ("CA") 1-16. 28 U.S.C. § 1331 provided the District Court with jurisdiction over the matter.

An Opinion and Order was entered on March 31, 2011, in favor of the United States Department of the Interior ("DOI"). *County of Charles Mix v. United States Department of the Interior*, ___ F.Supp.2d ___, 2011 WL 1303125 (D.S.D. 2011), Co. Add. 1-12. The judgment followed on April 4, 2011., Co. Add. 18.

The County timely filed a Notice of Appeal on June 1, 2011. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in denying the motion for summary judgment filed by County of Charles Mix and granting summary judgment and entering final judgment in favor of Defendants U.S. Department of the Interior, et al.

2. Whether 25 U.S.C. § 465 is unconstitutional as an improper delegation of Congressional power, as a violation of the Tenth Amendment, or as a violation of the Guarantee Clause.

3. Whether the decision to take the Travel Plaza into trust is contrary to the statutory aims of §5 of the Indian Reorganization Act.

4. Whether the Tribal Business and Claims Committee did not have authority to request the Travel Plaza to be placed in trust.

5. Whether the Secretary's decision to take the Travel Plaza into trust was arbitrary and capricious.

25 U.S.C. § 465

South Dakota v. U.S. Dep't of Interior, 314 F.Supp.2d 935 (2004)

South Dakota v. U.S. Dep't of Interior, 423 F.3d 790 (2005)

STATEMENT OF THE CASE AND FACTS

The Tribal Business and Claims Committee enacted a resolution asking that the BIA accept the Travel Plaza in trust. AR002651. "This property, commonly referred to as the "Yankton Sioux Travel Plaza" (Travel Plaza) is legally described as Lot 1 (also known as NE1/4NE1/4), less Lot H-1, sec. 1, T. 95 N., R. 65 W., 5th Principle Meridian, Charles Mix County, South Dakota, and is currently used for a gas station, a convenience store, and agricultural leasing." AR001324. The tax levy on the property was $6,423, $2,440.74 of which went to the County, with the remainder distributed to White Swan Township ($321.15), the Andes Central School ($3275.73), the Wagner/Lake Andes Ambulance Service ($128.46), the

Lake Andes/Ravinia Fire District ($192.69, and the Water Conservancy ($64.23)." AR001327.

Even though the Tribe's resolution stated that the action was appropriate, the Tribe's governing documents make clear that most of the authority of the Tribe is reserved to a general council, consisting of all tribal members present at designated meetings. A general meeting for this purpose was not convened.

The County received notice of the application. Administrative Record ("AR") 001326. The County and the State submitted written opposition to the application. 49 IBIA 132, AR001327; AR002610, 002563. The Superintendent issued a letter decision approving the transfer of the Travel Plaza into trust. 49 IBIA 132-133, AR001327-28, AR002431-39. The State and County appealed the Superintendent's decision to the Office of the Regional Director ("RD") in a timely fashion. AR002300. The acting RD requested additional documentation.

On May 22, 2007, the acting RD affirmed the decision of the Superintendent in a letter decision of the same date. AR001668. This letter decision purported to consider the factors required under 25 C.F.R. 151.10. AR001668-72.

The State and the County appealed the letter decision of the Acting RD to the IBIA in a timely fashion. AR001635. The State and County received a copy of the Administrative Record.

The IBIA issued a letter decision on April 30, 2009, affirming the acceptance of the 39-acre Travel Plaza in trust. The IBIA rejected all of the arguments of the State and the County, including a claim of bias which is a significant issue in this action. 49 IBIA 144-145, AR001339-40.

On June 22, 2010, the County filed suit in the District Court of South Dakota, Central Division. On March 31, 2011, the District Court filed its opinion. The District Court denied Summary Judgment for Plaintiff, County of Charles Mix, and granted Summary Judgment for Defendants. County of Charles Mix filed a timely notice of Appeal to this Court on June 1, 2011.

Most recently, on July 29, 2011, the Chairman of the Yankton Sioux Tribe prematurely conveyed the Travel Plaza property to the United States in trust for the Yankton Sioux Tribe, and the Bureau of Indian Affairs approved the deed on the same day. Co. Add. 13-14. The conveyance and approval are contrary to 25 C.F.R. 151.12. *See generally* Exhibit 1, Declaration of Pilar Thomas, attached to Corrected Brief in Support of the United States's Amended Motion to Dismiss or in the Alternative for Summary Judgment, in a related case, *State of South Dakota, et al. v. United States Department of the Interior, et al.* (No. 3:10-cv-03006-RAL), Co. Add. 15-17.

In addition, the general concerns of the County are reinforced by the recent decision of this Court in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, (8th

Cir. 2010), *cert. denied*, 2011 WL 196311, 180 L.Ed.2d 845 (U.S. June 20, 2011)(No. 10-931). The Court in *Yankton Sioux Tribe* approved the resurrection of 18 U.S.C. §1151(a) reservation boundaries around every tract of land placed in trust, now or in the future, within the disestablished boundaries of the 1858 Yankton Reservation. The Supreme Court of South Dakota previously rejected the existence of any reservation boundaries in the same area. *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999).

STATEMENT OF ARGUMENT

The district court erred in denying the motion for summary judgment filed by the County of Charles Mix and granting summary judgment and entering final judgment in favor of defendants U.S. Department of the Interior, et al.

Section 5 of the Indian Reorganization Act is an unconstitutional delegation of legislative power, it operates to deprive the County of a republican form of government, and that Section 5 violates both the Tenth and Fourteenth Amendments of the Constitution. The Tribal Business and Claims Committee also exceeded its authority by passing the resolution requesting that the BIA take the Travel Plaza land into trust. The County's due process rights were also violated because the RD was biased, and the County was not given adequate opportunity to review certain documents and to present evidence in response. The BIA's decision

to accept the Travel Plaza into trust was arbitrary and capricious and should be set aside pursuant to the Administrative Procedure Act.

STANDARD OF REVIEW

Summary judgment is appropriate if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

This matter is brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 701-706. Under the Administrative Procedure Act (APA), Court of Appeals will set aside an agency action if the Secretary acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A).

Constitutional claims relating to the action of agencies are entitled to de novo review. *Coalition for Fair and Equitable Reg*., 297 F.3d 771, 778 (8th Cir. 2002). Therefore, this matter merits de novo review. This Court likewise reviews de novo the district court's decision whether an agency action violates the APA. *St. Luke's Methodist Hosp. v. Thompson*, 315 F.3d 984, 987 (8th Cir. 2003). Under the APA, a reviewing court is required to "decide all relevant questions of law" and "hold unlawful and set aside agency action, findings and conclusions found to be ... not in accordance with law[.]" 5 U.S.C. § 706(2)(B).

ARGUMENT

The County recognizes that previous panels have rejected similar arguments in the process of upholding the placement of land in trust. *See*, Co. Add. 12, n.2, *County of Charles Mix v. U.S. Dept. of Interior*, ___ F.Supp.2d ___, 2011 WL 1303125.

Nevertheless, some of the arguments in this case are fact specific. Others, the County respectfully submits, present questions that are significant and, to date, have not been authoritatively resolved by the United States Supreme Court.

I. The District Court erred granting summary judgment in favor of defendants on the issue that 25 U.S.C. § 465 is not unconstitutional

A. The District Court erred in granting Summary Judgment in favor of defendants because Section 5 of the IRA is a lawful delegation of legislative power from Congress

25 USC §465 is unconstitutional as an unlawful delegation of legislative power from Congress to the executive branch in that it fails to provide sufficient boundaries and standards. The Supreme Court has held that an act of Congress violates the nondelegation doctrine unless "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

25 U.S.C. § 465 impermissibly delegates unrestricted power to acquire land without articulating when, where, or why such an acquisition would be appropriate, making it impossible for a court to determine whether any particular acquisition is consistent with congressional intent. Congress has not set meaningful standards or discernable boundaries which must be adhered to by the Bureau of Indian Affairs.

Section 5 of the IRA reads as follows: "The Secretary of the Interior is hereby authorized in his discretion, to acquire [by various means] any interest in lands, water rights, or surface rights to lands, within or without reservations … for the purpose of providing land to Indians." 25 U.S.C. § 465.

Congress has not provided an intelligible principle that can guide the Secretary's decisions. There is no limit or standard at all. Congress has not specified how much land may be acquired, where it should be located or what purposes the land should be used for. These vague standards make it impossible to divine whether land that is taken from a County and put into trust is fitting with Congress' intentions when it passed the Act. The broadness of section 5 delegates unrestricted and limitless power to the Secretary to acquire land for Indians without any articulation of such underlying public use as might justify the action. Therefore, the Secretary's decision to take the Travel Plaza into trust is an unconstitutional act of the Federal Government.

B. The District Court erred in granting Summary Judgment in favor of defendants because Section 5 of the IRA violates the 10th Amendment of the US Constitution

The authority to take land into trust for the benefit of an Indian tribe within a state of the union, at least in an off-reservation area, was not a power delegated to Congress by the Constitution. The authority over such lands was reserved to the states by the Tenth Amendment. As a result, 25 U.S.C. § 465 is unconstitutional as in conflict with the Tenth Amendment in this case.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft,* 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The Tenth Amendment reserves to the states those powers not delegated to the federal government. U.S. Const. Amend. 10, *United States v. Sprague*, 282 U.S. 716, 733, 51 S.Ct. 220, 222-223 (1931).

The district court stated that the 10th amendment is not implicated because the action under Section 5 of the IRA is derived from powers delegated to Congress in the Indian Commerce Clause. The Indian Commerce Clause does not bestow upon Congress the power to allow the Secretary to take land from a county and place it into trust for Indian tribes. The authority over its own land belongs to states and their counties. *U.S. v. Hubbard*, D.C.D.C. 1979, 474 F.Supp. 64. It stated that "The Constitution allocates power among the federal government and the states by specifying those powers that Congress might exercise and by

emphasizing in this amendment that undelegated powers are reserved to the state or respectively to the people."

C. The District Court erred in granting Summary Judgment for Defendants because Section 5 of the IRA violates the Guarantee Clause

Article 3, Sec. 4, of the United States Constitution requires that the United States "guarantee to every State in this Union a Republican Form of Government." It is integral to a "Republican Form of Government" that the residents of a city, state, or county be able to fully participate in its governance.

The acceptance of the Travel Plaza land into trust deprives the State, the County and other political subdivisions of the authority to tax and authority to regulate the land and its uses. Further, federal authorities assert that the acquisition of land in trust creates the area as "Indian Country." This deprives the State, the County and other local units of government of a substantial part of their criminal jurisdiction.

As a consequence, 25 U.S.C. § 465 is unconstitutional as applied to this case, for it operates to deprive the State of South Dakota and the County of a "Republican Form of Government."

II. The District Court erred in granting summary judgment in favor of Defendants because the Secretary's decision to take Travel Plaza into trust is contrary to the statutory aims of §5

The action at issue is beyond the authority delegated to the agency by 25 U.S.C. § 465. The acquisition has not been demonstrated to operate sufficiently to enable Indians to achieve self-support nor has it been demonstrated to operate sufficiently to ameliorate the damage of the allotment policy.

Congress passed the Indian Reorganization Act (IRA) to address the needs of impoverished and landless Indians. The goal of the Act was to repair the damage caused by the failure of the General Allotment Act of 1887 and the general federal allotment policy of the past.

As envisioned by its authors, the land acquisition authority in the IRA allowed the Secretary to fill in checker-boarded reservations that had been opened to settlement through allotment, and create small farming communities outside existing reservations, to allow impoverished and landless Indians to be self-supporting by using the land for agriculture, grazing, and forestry.

The IRA bill was substantially rewritten and stripped of any stated land acquisition policy, leaving the Secretary's authority to take land into trust unsupported by any statutory context.

The original goal of the IRA was to provide land for only landless and impoverished Indians. This goal and aim of the IRA will not be furthered by this application of section 5. The Yankton Sioux Tribe, for whom this application of

the IRA is benefiting, is not landless. Therefore, the decision of the Secretary should be set aside as not fitting with the aims of the IRA.

III. The Tribal Business and Claims Committee did not have authority to request the land to be placed in trust

1. Standing

The district court stated that it is questionable whether County has standing to bring this argument. To establish Article III standing, party invoking jurisdiction must demonstrate: (1) an injury in fact, which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) causal connection between injury and challenged conduct; (3) likelihood, and not mere speculation, that injury will be redressed by favorable decision. U.S.C. Const. Art. 3, § 2, cl. 1. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136 (1992); *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269 (2008).

The County of Charles Mix is a political subdivision of the State of South Dakota. The County has the interest of protecting its authority to tax and regulate the Travel Plaza lands and activities on those lands. Charles Mix County has significant governmental interests affected by the BIA's decisions to take fee lands into trust. Under 25 U.S.C. §465, lands taken into trust are freed from taxation by state and local government. BIA Rule 25 C.F.R. 1.4 purports to oust the State, the

County and other political subdivisions from zoning, regulating or otherwise controlling the use of real property taken into trust.

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.
> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

The United States has asserted that all land taken into trust constitutes "Indian Country," and that the County therefore no longer has criminal jurisdiction over the activities of Indians in all cases, and non-Indians in some cases, occurring on that real property.

The injury caused to the County is at least casually connected to the unauthorized decision of the Tribal Business and Claims Committee to request the land to be placed into trust. If a favorable decision is given, then the injury will be redressed. County has standing to contest the Tribal Business and Claims Committee's unauthorized conduct.

2. Authority

The County maintains that the Agency lacked jurisdiction to consider the Tribe's trust application because tribal law does not provide that questions of this magnitude can be decided by Tribal Business and Claims Committee. *See* AR002651, Complaint, Dkt. No. 1, Paragraph 54. The United States disputes this contention claiming that it is "nothing but a presumption." BUS at 18.

The Tribal Business and Claims Committee, which enacted Resolution 2004-019 and submitted it as an application to take the Travel Plaza lands into trust, lacked the authority as a matter of tribal law to enact the Resolution. This lack of authority deprived the Department of the Interior of jurisdiction to consider the application, and the application should be dismissed. Article IV, Section 1 of the Tribe's Amended Bylaws states that: [t]he Committee shall have the authority to investigate and transact all Tribal business of a routine nature and Indian legislation, including Industry, Sanitation, Housing, Redevelopment and etc., and shall also act in the capacity of a liaison delegation between the Tribe and Federal,

State and local governments, and such other agencies or parties that may offer opportunities for the Tribe.

See http://www.sdtribairelations.com/files/yanktoncon.pdf. (last visited March 11,2011)(containing Tribe's Constitution and Amended Bylaws).

IV. The Secretary's Decision was arbitrary and capricious

The District Court erred in its grant of summary judgment for defendant. The District Court erred in stating that the Regional Director's findings were proper. The Regional Director's findings regarding the factors in 25 C.F.R. 151.10 and 151.11 were unreasonable, arbitrary, capricious, irrational, unsupported by the record, and an abuse of discretion. Furthermore, the decision of the IBIA to uphold the decision of the Regional Director was unreasonable, arbitrary, capricious, irrational, unsupported by the record and constituted an abuse of discretion.

The acting RD and the IBIA improperly evaluated five of the factors set forth in 25 C.F.R. § 151.

The record in this case confirms that the Agency did not consider the Tribe's need for land and did consider the relevant statements of the total tribal population. AR001669. The record also reflects that the Agency did not properly consider the impact of removal from the tax base on local governments, including the County. The Agency again rejected the argument that one million seven hundred and fifty

thousand dollars ($1,750,000) is lost annually because of the thirty-six thousand seven hundred (36,700) acres of land already in trust in this County. South Dakota, 49 IBIA 106.

25 C.F.R. 151 § 151.10(f) requires consideration of jurisdictional problems from land being taken into trust. In this record, the County claims that the Acting RD mischaracterized the jurisdictional disputes at issue, misstated the relevant law … and failed to adequately consider the political, social and economic effect on the County. AR002321, AR002300, AR001194, AR001635, AR001612, AR00356. The agency did not articulate a rational connection between the facts found and the choice made. Similarly, the Agency's conclusion under 25 C.F.R. §151.10(g) regarding the BIA's capacity to administer the Travel Plaza is also without support in the record. AR002321, AR002300, AR00194, AR001635, AR001612, AR001356. The presence of law enforcement services and a hospital in the general area does not meet the requirements of this regulation. The BIA has not fully considered this issue. Because the RD and the IBIA's decision is arbitrary and capricious, it should be set aside as a violation of the APA.

CONCLUSION

For the foregoing reasons the decision of the District Court should be reversed and summary judgment should be awarded to County of Charles Mix. In

the alternative, the matter should be remanded to the Agency for further consideration.

Respectfully submitted,

/s/ Tom D. Tobin

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CERTIFICATE OF COMPLIANCE

1. I certify that the Brief of the Appellant County of Charles Mix is within the limitation provided for in Fed. R. App. P. 32(a) (5) using Times New Roman typeface in 14 point type. The Brief of the Appellant County of Charles Mix contains 4,065 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2007, and it is herewith submitted in PDF format.

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

Dated this 1st day of September, 2011.

/s/ Tom D. Tobin

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on September 1, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Tom D. Tobin