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

REPLY BRIEF OF APPELLANT COUNTY OF CHARLES MIX

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ARGUMENT

I. Charles Mix County has not waived its principal issues by presenting them in a limited fashion. Charles Mix County has provided sufficient citation to legal authority and has developed its arguments well beyond a perfunctory manner.

The United States argues that the Charles Mix County has waived some principal arguments by not citing legal authority and presenting its arguments in a perfunctory manner. Brief for the Appellees, *County of Charles Mix v. United States Department of the Interior, et al.* (No. 11-2217) at 19. Charles Mix County has adequately cited legal authority and developed its arguments sufficiently for this Court to review the decision below.

We recognize that this Court "regularly decline[s] to consider cursory or summary arguments that are unsupported by citations to legal authorities." *Watson*, 365 F.3d at 615. The *Watson* court stated: "Watson's entire argument on this point consisted of one sentence alleging that he attempted to offer into evidence testimony regarding affirmative-action reports that reflected deficiencies within the agency that needed to be corrected. Allegations of error not accompanied by convincing argument and citation to authority need not be addressed on appeal." *Id*. (citing Fed. R.App. R. 28(a)(9)(A)).

The arguments presented by Charles Mix County are certainly more than a single sentence and are also accompanied by adequate legal citations. This issue is

more fully set forth and discussed in cases such as *MacArthur v. San Juan County*, 495 F.3d 1157, 1160-1161 (10th Cir. 2007), where the argument section of the appellant's brief was insufficient, an argument on the abuse of discretion issue did not contain a single case citation, an argument on the qualified immunity issue did not cite a single case relevant to the underlying argument, and the words "standard of review" did not appear anywhere in the brief. There, despite the Court determining that the plaintiff's brief was inadequate, the Court nevertheless considered plaintiff's claims. *Id*. at 1161. Another example of where this rule is applicable is *John v. Barron*, 897 F.2d 1387, 1393 (7th Cir. 1990), where the appellant's brief, which consisted of only a one page argument unsupported by any authority, were inadequate. Charles Mix County's brief is distinguishable.

The well-developed arguments presented by Charles Mix County are supported by legal citation. Charles Mix County cites to prior precedent and statutory authority. Brief for the Appellant, *County of Charles Mix v. United States Department of the Interior, et al.* (No. 11-2217) at 4; *Id*. at 5; *Id*. at 6; *Id*. at 7; *Id*. at 10; *Id*. at 13. The United States' argument is inapplicable in the present case and the issues have not been waived.

II. This Court is not bound by the 2005 South Dakota II Decision that Section 5 of the IRA is not an unconstitutional delegation.

The United States claims that this panel is bound by the 2005 decision in South Dakota II. *State of South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). Appellees Br., at 23. Charles Mix County recognizes that this Court has stated that "it is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). Charles Mix County also recognizes that the Court of Appeals panel is bound by a prior Eight Circuit decision unless that case is overruled by Court sitting en banc. *Solis v Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009).

This Court, sitting *en banc*, recently proclaimed that a panel may not choose among conflicting prior decisions but must follow the earliest decision. In *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (*en banc*), the Court said:

> We definitively rule today, in accordance with the almost universal practice in other federal circuits, *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (collecting cases), that when faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have controlled the subsequent panels that created the conflict.' *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006).[1]

[1] *Mader* discusses this point in detail:

> [W]e address this circuit's "peculiar approach to conflicting prior panel opinions." *Williams v. Nat'l Football League,* 598 F.3d 932, 934 (8th Cir. 2009) (Colloton, J., dissenting from denial of rehearing en banc). "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). But, when faced with conflicting panel opinions, panels "are free to choose which line of cases to follow." *Meyer v. Schnucks Mkts., Inc.*, 163 F.3d 1048, 1051 (8th

Moreover, a limited exception to the prior panel rule permits the Court of Appeals to revisit an opinion of a prior panel if an intervening Supreme Court decision is inconsistent with the prior opinion. *McCullough v. AEGON USA Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009). And when faced with conflicting panel opinions, panels are no longer "free to choose which line of cases to follow." *Meyer v. Schnucks Mkts., Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998).

The court in this case should not be bound by its 2005 determination in South Dakota II that section 5 of the IRA is a constitutional delegation of legislative power. Rather, under the circumstances in this case, the Court should not be reluctant to follow the opinion of this Court in 1995. Because the 1995 opinion was vacated and remanded for reasons unrelated to the central argument regarding the constitutionality of the Indian Reorganization Act, it is clear that the action of the United States Supreme Court did not undermine the rationale set forth

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> Cir. 1998). Following this practice, the panel majority chose to follow *Farmers* instead of *Lunsford*, even though *Lunsford* was decided first.
>
> We definitively rule today, in accordance with the almost universal practice in other federal circuits, *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (collecting cases), that when faced with conflicting panel opinions, the earliest opinion must be followed "as it should have controlled the subsequent panels that created the conflict." *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006). Thus, as a matter of proper appellate review, the panel majority should have applied *Lunsford's* first-in-time interpretation of § 2675(a). But, because the en banc court is not bound by *Lunsford's* interpretation of § 2675(a), we now interpret the statute anew.

Mader, 654 F.3d at 800.

in the 1995 panel opinion. Moreover, the dissenting views of Justice Scalia, joined by two other members of the Court, further support this argument. *South Dakota v. United States Dept. of Interior,* 519 U.S. 919 (1996).

In *State of South Dakota v. United States Dep't of the Interior,* 69 F.3d 878 (8th Cir. 1995), *vacated and remanded,* 519 U.S. 919 (1996), this Court stated:

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe.... Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.

69 F.3d at 882.

The 1995 case was remanded in light of updated agency regulations. *See South Dakota v. United States Dep't of the Interior,* 519 U.S. 919, 919-920 (1996). The updated regulations did not remedy the unconstitutional nature of section 5 of the IRA. The Supreme Court's remand order was issued after the Department of Interior's promulgation of a new regulation, 25 C.F.R. § 151.12(b), which established a 30-day waiting period after a final administrative decision has been made to acquire land in trust. *See id.* The United States Supreme Court did not address the merits of whether 25 U.S.C. § 465 was an unconstitutional delegation

of legislative power. *See id*. It merely ordered that the Secretary of Interior reconsider his administrative decision. *See id.*

Clearly the decision in South Dakota I was vacated, but the Supreme Court did not touch on the constitutionality of section 5 of the IRA. Furthermore, even the United States Supreme Court's decision to vacate and remand the decision of South Dakota II was controversial. Justice Scalia stated "The decision today-to grant, vacate, and remand in light of the Government's changed position-is both unprecedented and inexplicable." *South Dakota v. United States Dep't of Interior*, 519 U.S. at 919-20. As noted above, two additional Justices joined this dissent.

The prior panel of the Eighth Circuit's reasoning is still sound. This court should at least address this prior opinion that found that section 5 of the IRA was an unconstitutional delegation of legislative power. Moreover, the rule in *Mader* lends additional support to this argument.

III. Section 5 violates the Tenth Amendment.

1. Indian Commerce Clause.

The government argues that the Indian Commerce Clause is sufficient justification for Congress to enact section 5 of IRA. Appellees Br., at 26. The Indian Commerce Clause does not give Congress the power to enact section 5 of the IRA. The Supreme Court has explained that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the

field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Supreme Court has stated that "[t]he power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)). In *United States v. Lara*, 541 U.S. 193, 205 (2004), the Court suggested that Congress could run up against "constitutional limits" if its Indian legislation "interfere[d] with the power or authority of any State."

The Supreme Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), that Congress cannot use the Indian Commerce Clause to infringe on an attribute of state sovereignty embodied in the Constitution. The taking of the Travel Plaza into trust for the Yankton Sioux Tribe pursuant to section 5 of IRA has done just that: it infringes upon the State's sovereignty without its consent.

Section 5 of IRA exceeds Congress's Indian Commerce Clause power and violates the Tenth Amendment. Section 5 of the IRA permits the BIA to take State territory with no historical connection to an Indian tribe, deem it an Indian reservation, and oust the State from control over the land. The Indian Commerce Clause cannot be construed to allow Congress such unfettered power to oust States from territorial control. If it were, there would be no stopping point--Congress could take any land, anywhere, in any quantity, and convert it into a sovereign

reservation. That is an exceedingly aggressive, and ultimately improper, interpretation of a constitutional provision that merely empowers Congress "[t]o regulate Commerce...with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

2. Territorial Integrity.

The principle of state territorial integrity is embodied in the Constitution as clearly as the principle of state sovereign immunity. The Constitution has many sections and provisions that clearly enunciate the principle that the federal government cannot encroach upon a state's control of its own territory without consent. The Enclave Clause, for example, authorizes Congress "[t]o exercise exclusive Legislation" on land "for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings"--but only if the land is "purchased by the Consent of the Legislature of the State in which the Same shall be located." U.S. Const. art. I, § 8, cl. 17. The Statehood Clause, likewise, provides that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1. The Supreme Court has held that this clause is a "guarantee...of state territorial integrity," and that it constitutes an "express element[ ] of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550

(1985). And the Tenth Amendment has long been understood to "expressly declare[ ] the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity," *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), and to block Congress from taking from States any of the "essential attributes inherent" in sovereign status. *Alden v. Maine*, 527 U.S. 706, 714 (1999). Atop the list of "essential attributes" is a state's territorial integrity: "Of all the attributes of sovereignty, none is more indisputable than that of [a state's] actions upon its own territory." *Green v. Biddle*, 21 U.S. 1, 43 (1823).

Recognizing that the Constitution protects state territorial integrity, the Supreme Court long ago held that "[i]t is incontestable" that a state "cannot be deprived" of control over its territory without its consent. *Id.* at 42. In *Fort Leavenworth Ry. v. Lowe*, 114 U.S. 525 (1885), the Court held that agreement of "the state within which...territory is situated" must be obtained "before any cession of sovereignty or political jurisdiction can be made to a foreign country." *Id.* at 540-41. More recently, the Court has held that Congress has no power to "reserve or convey...lands that ha[ve] already been bestowed upon a State," *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001), and that it "would raise grave constitutional concerns" if Congress "purported to 'cloud' [a state's] title to its sovereign lands" by recognizing a native land claim long after the state's admission to the Union. *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009). And the Court

has suggested that congressional action that causes a state to suffer a "loss of political jurisdiction" over land--including by expansion of tribal prerogatives--unlawfully "interfere[s] with the sovereignty of the state." *Oklahoma ex rel. Phillips v. Guy F.Atkinson Co.*, 313 U.S. 508, 534 and n.58 (1941).

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment is the core expression of federalism. As the Supreme Court has said, "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves[.]" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

While the particulars of Tenth Amendment jurisprudence have shifted through the decades, the Supreme Court has never wavered from its "conviction that the Constitution precludes 'the National Government [from] devour[ing] the essentials of state sovereignty.' " *Garcia*, 469 U.S. at 547. Trust acquisitions like this one offend the states' sovereign integrity like nothing else the United States does under the name of the Indian Commerce Clause.

IV. Guarantee Clause

The district court and the United States question whether Guarantee Clause challenges are justiciable. The United States set forth that question at page 29 of its brief.

In a case where a Guarantee Clause violation is alleged, it is the nature of the claim that determines whether the case is justiciable. *Cf. Baker v. Carr*, 369 U.S. 186, 211, 217 (1962); *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). The Supreme Court in *New York v. United States*, 505 U.S. 144, 185 (1992), indicated that certain claims brought under the Guarantee Clause of Article IV section 4 of the Constitution are in fact justiciable. Contemporary commentators have similarly suggested that courts should address the merits of such claims, at least in some circumstances. *See, e.g.*, L. Tribe, *American Constitutional Law* 398 (2d ed. 1988); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, and n., 122-123 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-289, 300 (1972); Merritt, 88 Colum.L.Rev., at 70-78; Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn.L.Rev. 513, 560-565 (1962).

All states, after their admission into the federal union, stand on equal footing, and the constitutional duty of guaranteeing each state a republican form of government gives Congress no power in admitting a state to impose restrictions which would operate to deprive that state of equality with other states. *Butler v.*

Thompson, 97 F.Supp. 17, 21 (E.D.Va.1951), *affirmed* 341 U.S. 937 (1951) (overruled in part by *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1996)).

The acquisition of the Travel Plaza land in trust is precluded by the Guarantee Clause of Article IV, Section 4. The government of the Yankton Sioux Tribe is non-democratic and non-republican. Representation in the Tribe is restricted to tribal members. The acquisition of land in trust by the United States, subjecting that land to tribal governmental authority, violates the republican form of government clause. Therefore, the United States' argument that the acquisition of the Travel Plaza into trust is not in violation of the Guarantee Clause is not persuasive. Appellees Br., at 15.

V. The District Court had jurisdiction to review the actions of the Committee of the Yankton Sioux Tribe in this case.

Charles Mix County recognizes that jurisdiction to resolve ordinary "internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts." *See United States v. Wheeler*, 435 U.S. 313, 323-36, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). But this case involves more than an internal tribal dispute. Vital interests of Charles Mix County are at stake. The district court had jurisdiction to review the action of the Committee of the Yankton Sioux Tribe

In other instances where the interests of nontribal members were at issue, the federal courts have not hesitated to define the scope of tribal jurisdiction. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989), *Duro v. Reina*, 495 U.S. 676 (1990), *A1 Contractors v. Strate*, 520 U.S. 438 (1997) and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008).

The district court was mistaken in invoking 25 C.F.R. §151.9. It has nothing to do with the requirement that the Yankton Sioux Tribe act in a tribal council of all members in this instance. Moreover, Charles Mix County is not aware of any decision of the Yankton Sioux Tribal Court to the contrary, and the United States does not cite one.

VI. The decision of the Administrator was arbitrary and capricious because it failed to discuss the evidence set before it and because it failed to render a satisfactory explanation for its actions in view of the evidence before it.

The decision to take the Travel Plaza into trust was arbitrary and capricious and an abuse of discretion. Under the arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Qwest Corp. v. Boyle*, 589 F.3d 985, 998 (8th Cir. 2009). When reviewing agency action under the APA, "this court must render an independent decision on

the basis of the same administrative record as that before the district court." *United States v. Massey,* 380 F.3d 437, 440 (8th Cir. 2004). The agency action is upheld unless it is, based on the administrative record, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under the arbitrary and capricious standard is "narrow"; the standard does not permit "a court ... to substitute its judgment for that of the agency." *Connect Commc'ns Corp. v. Sw. Bell Tel., L.P.,* 467 F.3d 703, 711 (8th Cir. 2006)(quoting *In re Core Commc'ns, Inc.,* 455 F.3d 267, 277 (D.C. Cir. 2006)).

The United States contends that the district court correctly concluded that the acting Regional Director adequately addressed the tribe's need for the land. Appellees Br., at 35. 25 C.F.R. §151.10(b) requires an analysis of the "need of the individual Indian or Tribe for additional land." The Superintendent's discussion of the "need'' factor includes only conclusory allegations that the land would provide for economic development. Administrative Record ("AR") 1693. These conclusory allegations do not establish even a "need'' to possess that land, and certainly do not establish a "need'' to place the land into trust. The decision maker was required to consider whether the land needed to be in trust. 25 C.F.R. §151.10(b). But here, the decision maker never made a determination as to whether the land needed to be "in trust." AR 1693. There was neither a discussion

of how much land the tribe already has with which to assist in economic development nor how this land would specifically assist in economic development. Rather, he merely stated a general principle that the tribe needed land. *Id*.

Moreover, an agency decision is "arbitrary and capricious" when the agency fails to perform an "individual" case analysis and instead applies a per se rule. *Parker v. U.S. Dep't of Transp.*, 207 F.3d 359, 363 (6th Cir. 2000). An agency must explain why it decided to act as it did. The agency's statement must be of reasoning, it must not be just a conclusion; it must "articulate a satisfactory explanation for its action." *Butte County v. Hogen,* 613 F.3d 190, 194 (D.C. Cir. 2010). *See also, Jackson County v. Phoenix Area Director,* 31 IBIA 126, 138 (1997) (the Board "holds that the failure to verify material facts and/or law upon which a discretionary decision is based constitutes both an error of law and an abuse of discretion.")

The Superintendent did not perform an individual analysis. He failed to analyze the plain economic fact that this tribe does not need this land for self-support or economic development. Instead, it relies on the vague and unproven assertion that this tribe, and implicitly, every tribe needs more land. AR 1693.

The United States likewise makes no attempt to show that this acquisition had the effect of "ameliorating the damage resulting from the prior allotment policy." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005).

It has been established that, even in the IBIA, a finding which is "speculative" is subject to reversal. *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director,* 36 IBIA 14, 21 (2001) (Regional Director erred "in speculating"); *see also Town of Charleston v. Eastern Area Director,* 35 IBIA 93, 103 (2000). The Eighth Circuit has also found reliance on speculation to be impermissible. *See N.L.R.B. v. MDI Commercial Services,* 175 F.3d 621, 626 (8th Cir. 1999) (impermissible reliance on speculation); *Baker v. Apfel,* 159 F.3d 1140, 1146 (8th Cir. 1998) (impermissible reliance on speculation).

The Superintendent stated that accepting the land into trust would provide job opportunities to both tribal and non-tribal members. The Regional Director's *ipse dixit* lacked any factual support in the record. AR 1693. Moreover, those jobs were already there and being provided. The acquisition of the land into trust will not further this goal at all.

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.

Dated this 13th day of December, 2011.

Respectfully submitted,

/s/ Tom D. Tobin

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CERTIFICATE OF COMPLIANCE

1. I certify that the Reply 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 Reply Brief of the Appellant County of Charles Mix contains 3,987 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 13th day of December, 2011.

/s/ Tom D. Tobin

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on December 13, 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