IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

C.A. No. 03-2647

DONALD L. CARCIERI, in his capacity
as Governor of the State of Rhode Island,
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
a sovereign state of the United States of America,
and TOWN OF CHARLESTOWN, RHODE ISLAND,

Plaintiffs-Appellants

v.

GALE A. NORTON, in her
capacity as Secretary of the Department of the Interior,
United States of America, and FRANKLIN KEEL,
in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department
of the Interior, United States,

Defendants-Appellees

On Appeal From a Judgment of the United States
District Court for the District of Rhode Island

APPELLANTS' JOINT MEMORANDUM OF LAW

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I. JURISDICTIONAL STATEMENT

This matter arises from an administrative decision by the Secretary of the Untied States Department of Interior (the "Secretary") to take land into trust in Rhode Island on behalf of the Narragansett Indian Tribe ("Narragansetts" or the "Tribe"). The State of Rhode Island, through the Attorney General, the Governor, and the Town of Charlestown (the "State Appellants") appealed that decision to the United States District Court under federal question jurisdiction pursuant to 28 U.S.C. § 1331 seeking to enjoin the actions of the Secretary as contrary to the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, the Administrative Procedures Act, 5 U.S.C. § 706, and in violation of various provisions of the United States Constitution.

The District Court entered final Judgment on September 29, 2003. The State Appellants filed a timely Notice of Appeal on November 26, 2003. This Court has jurisdiction based upon 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Is the Indian Reorganization Act of 1934 applicable to the Tribe?
2. Does the conversion of the Parcel to trust violate the 1978 Rhode Island Indian Claims Settlement Act?
3. Must any trust conversion of the Parcel, at a minimum, be restricted to

preserve the full applicability of the State's civil and criminal laws and jurisdiction?

4. Does trust conversion of the Parcel violate the sovereignty of the State under various provisions of the United States Constitution?

5. Does Section 465 of the Indian Reorganization Act of 1934 violate the nondelegation doctrine?

6. Is the Secretary's Decision to convert the Parcel to trust an abuse of discretion under Administrative Procedures Act?

III. STATEMENT OF THE CASE

On July 17, 1997 the Tribe filed a second application with the BIA seeking to have the Parcel taken in trust. On March 6, 1998, the BIA wrote to the Tribe, indicating its intention to do so. The rationale for this decision was articulated in an undated staff memorandum (the "Decision"). Subsequently, the then-Governor and the Town filed separate Notices of Appeal requesting review of the Decision by the Interior Board of Indian Appeals ("IBIA"). On June 29, 2000, the IBIA issued a written decision affirming the BIA and denying the State and the Town appeal. The action below followed. In a decision dated September 29, 2003 the District Court entered summary judgment against the State Plaintiffs and for the

Federal Defendants, dismissing all nine counts. Plaintiffs filed a timely notice of appeal in the District Court.

IV. STATEMENT OF FACTS

The following undisputed facts are relevant to this appeal:

1. In 1934, the Narragansett Indian Tribe was not under federal jurisdiction and was not recognized by the federal government. 1927-1937 BIA Letters (Addendum at 5).

2. In 1975, the Narragansett Indian Tribe brought two lawsuits against the State, Town of Charlestown, and some Charlestown landowners for 3,200 acres of land based upon aboriginal title to its former colonial reservation (the "Lawsuits"). *Carcieri v. Norton*, 290 F. Supp.2d 167, 170-71 (D.R.I. 2003).

3. In the Lawsuits, the Tribe claimed that it sold its land without congressional approval as required by the Indian Nonintercourse Act, 25 U.S.C. § 177 and that, accordingly, the transfer of land was void.

4. The 31 acre housing site that is the subject of this litigation (the "Parcel") was part of the 3,200 acres over which the Tribe asserted aboriginal right in the Lawsuits. *Carcieri v. Norton*, 290 F. Supp.2d at 170.

5. On February 28, 1978 the parties settled the Lawsuits and executed an agreement the terms of which were set out in a Joint Memorandum of

Understanding (the "JMOU") signed by the State, the Tribe, the Town and others. See *State v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1993); JMOU (Addendum at 3).

6. In the JMOU the parties affirmed that the "provisions of settlement" were "to be considered as inseparable, dependent requirements and which are all conditioned upon requisite, favorable and timely action by the executive and legislative branches" of the State of Rhode Island and the United States government. JMOU at preamble.

7. The terms of the JMOU were simple. The State agreed to provide 900 acres of land. JMOU at ¶ 2. The parties agreed that the federal government would provide $3.5 million for the acquisition of an additional approximately 900 acres. JMOU at ¶ 5. Together, these lands are referred to as the "Settlement Lands." In exchange, the parties agreed that the Settlement Lands would be permanently held by a state-chartered corporation (the "State Corporation") for the "benefit of the descendants of the 1880 Rhode Island Narragansett Roll." JMOU at ¶¶ 1, 8. The parties, in particular the Tribe and the State, agreed "[T]hat, except as otherwise specified in the Memorandum, all of the laws of the State of Rhode Island shall be in full force and effect on the Settlement Lands." JMOU at ¶ 13.

8. Finally, because the claims made in the Lawsuits asserted aboriginal or Indian title, and the Tribe's claim of sovereignty over the land, congressional

action to extinguish that claim was necessary. To this end, the JMOU required federal legislation that would "eliminate all Indian claims of any kind, whether possessory, monetary or otherwise, involving land in Rhode Island." JMOU at ¶ 6. The parties also agreed that the Lawsuits would be dismissed with prejudice once Congress passed a statute extinguishing the Tribe's aboriginal title in Rhode Island. JMOU at ¶ 19.

9. Congress subsequently considered legislation implementing the terms of the JMOU and passed the Rhode Island Indian Claims Settlement Act. 25 U.S.C. § 1701 *et seq.* (the "Settlement Act"). (Addendum at 4). In the Settlement Act, Congress extinguished the Tribe's aboriginal title to land in Rhode Island. 25 U.S.C. § 1705(a)(2). Congress separately extinguished the Tribe's (or any successor in interest to the Tribe) ability to make any "claims" "based upon any interest in or right involving" land in Rhode Island. 25 U.S.C. § 1705(a)(3).

10. Congress implemented the parties' agreement to establish the Settlement Lands, and appropriated money for the purchase of a portion of the Settlement Lands. 25 U.S.C. § 1702 (d), (e), and (f); § 1703 (establishing the Rhode Island Indian Claims Settlement Fund (the "Fund") and § 1710.

11. The Parcel, although claimed in the Lawsuit, did not become part of the Settlement Lands. 290 F. Supp.2d at 170.

12. Congress also authorized the creation, under state law, of a state corporation to "perpetually manage, and hold the [S]ettlement [L]ands." 25 U.S.C. §§ 1706(a)(1) and (a)(3). Congress required the state corporation to be controlled by a board of directors, the majority of whom were required to be selected by the Tribe. 25 U.S.C. § 1706(a)(2). Congress then proclaimed that "[E]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.

13. Once the Secretary fulfilled certain specified obligations contained in the Settlement Act, Congress discharged the United States from any "further duties or liabilities under the [Settlement Act] with respect to the [Tribe], the State Corporation, or the Settlement Lands." 25 U.S.C. § 1707(c).

14. After the federal legislation passed, the Lawsuits were dismissed with prejudice. Later, in 1979 the State created a state-chartered corporation (the "State Corporation"). The State Corporation held the Settlement Lands for the Tribe and was controlled by the Tribe through a majority of seats on its Board. R.I. Gen. Laws § 37-18-1 *et seq*.

15. The Tribe applied for federal recognition and, in 1983, the Secretary granted the Tribe's application. 43 Fed. Reg. 6177-78 (1983); 290 F. Supp.2d at 170.

16. In 1985, the Rhode Island General Assembly passed laws terminating the State Corporation, transferring the Settlement Lands to the Tribe and passing the duties and liabilities of the State Corporation with them. R.I. Gen. Laws § 37-18-12, 13 and 14.

17. In 1988, the Tribe, in turn, deeded the Settlement Lands to the United States to be held in Trust. 290 F. Supp.2d at 170. The United States accepted the Settlement Lands into trust, expressly recognizing the continued "applicability of state laws conferred by the Rhode Island Indian Land Claims Settlement Act." A copy of that Deed is attached (Addendum at 6).

18. The Parcel is separated from the Tribe's existing trust lands by a Town road. 290 F. Supp.2d at 170.

19. The Parcel is located within the coastal zone designated in the State's Coastal Resources Management Program ("CRMP"), adopted pursuant to the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-1465. *See, e.g.*, AR, Vol I, Tab 15 (p. 5);[1] (Appendix "App." at Tab 1) Admission (#17) to Federal Defendants' May 30, 2001 Response to Discovery.

20. The Parcel is located in a section of the Town zoned to require a minimum of two (2) acres of land for each residential unit, because of environmental concerns and regulations of the Coastal Resources Management

[1] Citations to the administrative record are referred to as "AR" and are contained in the Appendix.

Council ("CRMC") who enforce the CZMA. *See e.g.*, AR, Vol I, Tabs X (Ex. A), 15 (p. 5) (App. at Tab 3); Admission (#18) of Federal Defendants' May 30, 2001 Response to Discovery (App. at Tab 2).

21. No Assent was issued to the Secretary nor was any Federal Consistency Review application made or undertaken by the Secretary before the CRMC.

22. The Parcel is burdened by grants of easements to the Town. The Tribe has been permanently enjoined from interfering with said easements. *See Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F. Supp. 349 (D.R.I. 1995), *rev'd in part, aff'd in part*, 89 F. 3d 908 (1st Cir. 1996).

23. In 1991, the Parcel was purchased from a private developer by the Wetuomuck Housing Authority ("WHA"). The WHA was established by the Tribe and was recognized by the United States Department of Housing and Urban Development ("HUD") as an Indian Housing authority. HUD provided the money to purchase the Parcel. *See* ¶19 Defendants' Answer. (App. at Tab 4).

24. In 1995, the District Court found the proposed housing project detrimental to coastal and groundwater resources. *Narragansettt Electric*, 89 F. 3d 908, 912 (1st Cir. 1996) (quoting 878 F. Supp. 349 at 355 (D.R.I. 1995)). After a hearing the Court determined that:

> The evidence demonstrates that the housing site is in close proximity to Ninigret Pond, a fragile salt water estuary that is a prime spawning ground for several species of commercially important fish. Ninigret Pond is already ecologically stressed principally by the infiltration of

> nitrates in the groundwater which lowers the oxygen content of the pond thereby adversely effecting both plants and fish life. There is at least, a real possibility that nitrates added to the groundwater by the [housing projects] ISDS [Individual Sewage Disposal Systems] systems will flow into the pond and worsen an already serious problem.

25. On July 17, 1997, after having first filed in March, 1994, the Tribe filed its corrected, updated, and final application with the Secretary of the Interior/Bureau of Indian Affairs (collectively, the "Secretary" or "BIA") seeking to have the Parcel taken in trust by the Secretary acting on behalf of the United States (collectively, the "Federal Appellees"). *See, e.g.*, AR, Vol. II, Tab D (App. at Tab 5). The Tribe based its trust application upon its federal recognition obtained in 1983. See AR, Vol. I, Tab A (App. at Tab 6), and Vol. II, Tab C, Exh. 1 (Tribal resolution seeking trust) (App. at Tab 7) ; *see also* 48 FED. REG. 6177 (federal recognition of the Tribe). The BIA also based this trust on its authority under 25 U.S.C. § 465 for this Tribe. See AR, Vol. II, Tab H at 1 (App. at Tab 8); Vol. II, Tab D (App. at Tab 5).

26. The trust application makes repeated requests that the land be taken out of the State's jurisdiction. *See, e.g.*, AR, Vol. I, Tabs D (App. at Tab 9), H (App. at Tab 10), I (App. at Tab 11); Vol. II, D (application memorandum (p.12)) and Tab D, subtabs 5 and 6 (App. at Tab 5).

27. The trust application states that the Parcel is to be taken in trust for the purpose of constructing fifty (50) housing units for tribal members. *See e.g.*, AR,

Vol. I, Tabs B (App. at Tab 12), D (App. at Tab 9), H (App. at Tab 10), K (bottom p. 2) (App. at Tab 13), X (App. at Tab 3); Vol. II, Tabs D subtabs 3, 4, 5 (App. at Tab 5); Vol. II, Tab N (App. at Tab 14).

28. On July 24, 1997, the BIA sent notice to the Town that the trust application was under consideration. The July 24, 1997 notice requested certain information from the Town. *See* AR, Vol. II, Tab E (App. at Tab 15). The BIA failed to notify State authorities that a trust application was under consideration.

29. On March 6, 1998 the BIA wrote to the Tribe indicating its intention to take the Parcel into trust. AR Vol. II, Tab O (the "Decision") (App. at 16). The rationale for the Decision was articulated in an undated staff memorandum. AR, Vol. II, Tab H (App. at Tab 8).

30. While the Decision purports to evaluate the Tribe's 1997 application, *see* AR, Vol. II, Tab D (App. at Tab 8), it is a word-for-word regurgitation of correspondence drafted by the Tribe's legal counsel in 1993. *Compare* AR, Vol. I, Tab D (App. at Tab 9) *with* AR, Vol. II, Tab H (App. at Tab 8).

31. Subsequently, on or about April 9, 1998, the State and the Town filed separate Notices of Appeal requesting review by the Interior Board of Indian Appeals ("BIA") of the Decision. *See* AR, Vol. II, Tabs S (App. at Tab 17), T (App. at Tab 18), U (App. at Tab 19).

32. On June 29, 2000, the IBIA issued a written decision affirming the

decision of the Secretary and denying the appeal of the State and the Town. *See* AR, Vol. IV, Tab L (App. at Tab 20).

33. The agency decision was made by the Secretary herself, or by or through the BIA.

34. The Secretary is subject to the requirements of National Environmental Policy Act ("NEPA"), and its corresponding regulations. *See* 42 U.S.C. §§ 4321-4370e.

35. NEPA requires an agency to prepare a "detailed statement" describing among other things, the "environmental impact of the proposed action . . . any adverse environmental effects which cannot be avoided, [and] . . . alternatives to the proposed action." *See* 42 U.S.C § 4322(c).

36. The BIA did not prepare an Environmental Assessment ("EA"). Interrogatory Answer (#6) of Federal Defendants' May 30, 2001 Response to Discovery (App. at Tab 2); *see also* AR, Vol. I, Tab K (App. at Tab 13); Vol. II, Tab B (App. at 21).

37. The BIA did not prepare an Environmental Impact Statement ("EIS") in connection with its consideration of the Tribe's trust application. Interrogatory Answer (#7) and Admission (#24) of Federal Defendants' May 30, 2001 Response to Discovery. (App. at Tab 2). Instead, it issued a finding of no significant impact. AR, Vol. II, Tab B (App. at Tab 22).

38. The BIA did not address the environmental consequences of the housing project outlined by this Court in 1995.

39. The BIA did not consider any alternatives to lessen the environmental impacts of the Tribe's proposed development.

40. In making its determination the BIA continued to rely on an EA drafted by the Tribe and dated March 18, 1994 that never addressed the environmental concerns raised in 1995. *See* AR, Vol. I, Tab K (App. at Tab 13).

41. In relying on the Tribe's EA, the BIA's NEPA Compliance Officer's response was: "Not much of an EA, but what the heck." *See* AR, Vol. I, Tab K (App. at Tab 22).

42. The funding to complete the Tribe's housing project is provided for pursuant to the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S. §§ 4101-4212.

43. NAHASDA mandates the execution of a local cooperation agreement with the "governing body of the locality" which is the Charlestown Town Council. *See* 25 U.S.C. §4111(c). It later was amended to provide for a waiver from that requirement. (Pub. L. 106-569 Dec. 27, 2000). At no time was the Town notified that a waiver was under consideration. No notice or opportunity to be heard was provided to the Town to contest any waiver. The District Court stated that a waiver apparently was granted.

44. The BIA did not undertake any analysis or consideration of potential gambling activity on the Parcel.

45. In considering the Tribe's trust application, the BIA did not make a written determination that the Town's drainage easement interest would not interfere with the purposes for which the Parcel was be acquired. *See* Federal Defendants' Response to Almond's Request for Production of Documents, Response #8 p. 3 (August 10, 2001) (App. at Tab 23).

46. The Parcel remains in fee status pending this appeal pursuant to a Joint Stipulation filed after the Judgment was entered.

V. SUMMARY OF ARGUMENT

At the heart of this appeal is an issue of manifest importance; namely, whether the Settlement Act prohibits the creation of sovereign territory for the Narragansetts in Rhode Island. Indeed, ensuring the continued applicability of the State's civil and criminal laws and jurisdiction throughout Rhode Island is the *sole* reason for this appeal. Conversely, their quest to obtain the first Indian territory in the State free and clear from State law and jurisdiction is the reason why the Tribe and Federal Appellants created this controversy.[2]

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[2] The Tribe already owns the Parcel in fee simple. The Tribe's proposed housing project is partially constructed and supported by the State and Town. It is undisputed that there is no HUD or other federal requirement that the Parcel be

(continued...)

Since the founding of the republic, Rhode Island's laws and jurisdiction have applied to all persons[3] and places within its borders; its sovereignty relinquished only with its express consent.[4] Unless this Court reverses the judgment below, the Narragansett Indian Tribe, through the United States government, will have created an unprecedented sovereign territory in Rhode Island practically immune from State civil and criminal laws and jurisdiction.

Federal Appellants base their right to create this territory for the Tribe entirely upon the Indian Reorganization Act of 1934 (the "IRA" or the "1934 Act"), and its provisions allowing the federal government to take land into trust for certain Indian tribes – a trust that, unless restricted, would create federal "Indian country" where state laws, property taxes and local land use laws would not apply.

For several powerful reasons, the unprecedented creation by the federal

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[2](...continued)
converted to trust for the housing project to be completed. As such, this case is not about housing at all – it is about the Tribe's quest with federal government support to obtain sovereign territory and State Appellants' position that this result runs contrary to law.

[3] To be clear, there is no dispute that the Narragansetts, as a federally-recognized tribe, have inherent sovereign rights as a people. Like its sister, the Alaska Native Claims Settlement Act, the Rhode Island Act ensured, however, that the Tribe's sovereignty would be separated from the land; it would have sovereignty over its members and internal governance only. As far as the land was concerned, State laws and jurisdiction would apply. *See infra* note 14.

[4] R.I. Gen. Laws § 42-1-2 (jurisdiction of State extends "to all places and boundaries" except places "ceded to the United States" and "purchased by the United States with the consent of the state.".

government of sovereign territory for the Tribe over the objection of the State is contrary to law, logic and history.

This Court need look no further than the plain language of the 1934 Act itself. In that Act, the definition of "tribe" incorporates the defined term "Indian" for the purpose of limiting the tribes to which it would apply. 25 U.S.C. § 479. "The term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation . . . ." *Id.* It is crystal clear that unless a tribe was both *recognized* and *under federal jurisdiction* in 1934, the federal government is not allowed to take State land into trust. Indeed, both the Supreme Court and the Fifth Circuit have already so held. *United States v. John*, 437 U.S. 634 (1978) ("The 1934 Act defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" (bracket in original)); *United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) ("tribal status is to be determined as of June, 1934"). Because, as shown below, it is an undisputable historical fact that the Tribe was *not* under federal jurisdiction (nor was it federally recognized) in 1934, the federal government cannot take land into trust for the Tribe under the 1934 Act.

If Federal Appellees somehow surmount this obstacle, they run head on into

the 1978 Rhode Island Indian Claims Settlement Act. In that Act, the Tribe relinquished and Congress *extinguished* the ability of any tribe to claim territorial sovereignty anywhere in the State. The Settlement Act accomplished this in two ways: 1) it extinguished aboriginal title, if any, anywhere in the State; 25 U.S.C. § 1705(a)(2); § 1712(a)(2); and 2) it extinguished "all claims against . . . any State . . . by the . . . Tribe . . . or any other Tribe . . . based upon *any interest in or right involving* [Rhode Island] land or natural resources . . . "). 25 U.S.C. § 1705(a)(3); § 1712(a)(3) (emphasis added). In so doing, Congress effectuated wall-to-wall protection of State sovereignty from *all* then-present and future claims, interests and rights. This protection included the extinguishment of both aboriginal title claims and sovereignty rights by all present and future tribes to any sovereign territory in Rhode Island.

Moreover, as part of the deal, the Tribe received 1,800 acres of land (it had claimed 3,200 acres including the Parcel) in the heart of its ancestral home. In exchange, however, the Tribe agreed (as did Congress) that the Settlement Lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. Thus, even in the epicenter of its aboriginal base, the Tribe agreed (and Congress ordained) that the Tribe would not exercise territorial sovereignty. State laws and jurisdiction would continue to apply there just as they had since the founding of the republic. It stands law, history and logic on its head to suggest

post-Settlement Act that the executive branch of the federal government, on behalf of the Tribe, can provide in 2004 what an act of Congress expressly extinguished long ago – namely, a federally-imposed sovereign territory for the Tribe anywhere in the State of Rhode Island.

The result is that the Parcel cannot be placed into trust by the executive branch consistent with the congressionally-mandated Settlement Act. The only way a federal trust could possibly occur after the Act is if it were restricted to do the very thing Federal Appellees and the Tribe abhor – make the Parcel subject to the continued applicability of the State's civil and criminal laws and jurisdiction. As such, the Parcel would not be federally superintended, and therefore not Indian country. If this Court somehow finds that any federal trust taking is permissible, a restricted trust (as on the Settlement Lands) is the only way that Congress' language and intent in the Settlement Act can be harmonized with Federal Appellees' desire to place the Parcel into trust.[5]

Just as taking of the Parcel into trust violates the Settlement Act, the evisceration of State jurisdiction and laws on the Parcel also violates the sovereignty of the State under various provisions of the United States Constitution.

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[5] Indeed, the Settlement Lands themselves were taken into federal trust in this way in 1988. The trust document contains the express restriction that the trust conversion "does not alter the applicability of state law conferred by the Rhode Island Indian Claims Settlement Act . . . 25 U.S.C. 1701 *et. seq.*" (Addendum at 6).

Through the trust's jurisdictional grab from the State, coupled with other federal power, Federal Appellants wrongly propose to diminish the sovereign territory of Rhode Island without its consent in violation of art. I, § 8 cl. 17 and art. IV § 3 of the United States Constitution as well as the Tenth Amendment. Simply put, Indian country cannot be established in Rhode Island over the State's objection.

Moreover, the standardless delegation by Congress of authority to the Secretary to take land into trust under the IRA is a violation the nondelegation doctrine. The only limitation in § 465 on the Secretary's trust-taking authority is that the trust acquisition must be "for the purpose of providing land for Indians." 25 U.S.C. § 465. Congress has failed to lay down the required "intelligible principle" to guide the Secretary and two out of three circuit courts have so held or implied.

Finally, the Decision to take the Parcel into trust was unlawful under the Administrative Procedures Act. Even with the standardless delegation, the record is replete with arbitrary and capricious decisions by the BIA and actions not in accordance with law. The Secretary relied exclusively upon information submitted by the Tribe, failed to follow her own regulations, and failed to consider applicable acts of Congress. Furthermore, the BIA accepted a sister agencies' waiver of a mandatory cooperation agreement with the host community concerning the Parcel without any due process or opportunity to be heard on the necessity for that waiver.

VI. ARGUMENT

A. The Indian Reorganization Act of 1934 Does Not Apply to the Narragansett Indian Tribe

The Indian Reorganization Act (the "IRA") was enacted to change the federal policy of assimilation of tribes that existed for nearly fifty years as a result of the General Allotment Act of 1887.[6] That policy, which began when westward expansion of this country was complete, "was simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 254-55 (1992) (recounting allotment act policy that lead to IRA). The allotment acts were a failure and renounced by the IRA.[7] Congress enacted the IRA to prohibit further allotments and to prevent the further loss of Indian land and, in particular, authorized the Secretary to take land into trust for certain landless Indians, as defined therein. 25

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[6] General Allotment Act of 1887, ch. 119, 24 stat. 388 (codified as amended at 25 U.S.C. §§ 331-354 (1994)); *see e.g.*, Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of The Indian Law Civil War*, 14 U. Puget Sound L. Rev. 235, 239 (1991) ("Furber"); Joseph D. Matal, *A Revisionist History of Indian Country*, 1997 Alaska L. Rev. 283, 306, 307 ("Matal").

[7] *Yakima*, 502 U.S. at 255; *see also* Furber, at 239-60 (discussing enactment and history of IRA); Matal, at 306-07 (recounting policy that led to IRA).

U.S.C. §§ 461, 465. There has never been a federal allotment in Rhode Island.

In marching through the wide expanse of federal Indian law and the Settlement Act, it is easy to lose sight of the obvious. Whether the Narragansett Indian Tribe is a tribe covered by the IRA is a threshold matter upon which the Decision taking the Parcel into trust rests.[8] The plain language of the statute, all precedent interpreting it and the undisputed historical facts regarding the status of the Narragansett Indian Tribe with the federal government in 1934, lead to the inexorable conclusion that the Tribe is not one of the tribes within the scope of the 1934 Act.

The authority to take land into trust is limited to "Indians" as carefully defined in the IRA. Section 465 authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465 (emphasis added.). For the purpose of § 465:

> [t]he term Indian . . . shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all of the persons of

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[8] The Tribe based its trust application upon federal recognition, which it obtained in 1983. See AR, Vol. I, Tab A (App. at Tab 6), and Vol. II, Tab C, Exh. 1 (Tribal resolution seeking trust) (App. at Tab 7); *see also* 48 FED. REG. 6177 (federal recognition of the Tribe). The BIA based this trust on its authority under 25 U.S.C. § 465 for this Tribe. See AR, Vol. II, Tab H at 1 (App. at Tab 8); Vol. II, Tab D (App. at Tab 5).

> one-half or more Indian blood. . . . The term "tribe" whenever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. § 479 (emphasis added).

The definition of "tribe" thus incorporates the defined term "Indian." *Id.* The Fifth Circuit considered this clear language and held that:

> The language of [25 U.S.C. § 479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words "*any recognized Indian tribe now under Federal jurisdiction*" and the additional language to like effect.

United States v. State Tax Comm'n, 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original). More importantly, the Supreme Court has likewise indicated that "[t]he 1934 Act defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,'" and looked to the relationship between the tribe and the federal government "at the time the Act was passed." *United States v. John*, 437 U.S. 634, 650 (1978) (bracket in original). The only other reported case to opine on the definition likewise recognized that tribal status was to be determined at the time of passage of the 1934 Act. *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 & n.6 (D.D.C. 1980) (citing *State Tax Comm'n*).

The District Court concluded that "as a federally-recognized tribe which existed at the time of enactment of the IRA, the Narragansett tribe qualifies as an 'Indian tribe' within the meaning of §479." *Carcieri v. Norton*, 290 F. Supp.2d at

181. Were existence in 1934 and recognition by the federal government at any time thereafter the statutory test, State Appellants would have no quibble with the District Court. The unambiguous language of the 1934 Act, however, sets forth a very different mandate.

The Act's plain language dictates that tribal status sufficient to trigger the 1934 Act requires a tribe to fulfill both parts of a two prong test: first, was the tribe federally "recognized" in 1934; and second, was the tribe "under Federal jurisdiction" in 1934? If either answer is negative, the Act does not apply to the Tribe.

1. *Not Under Federal Jurisdiction in 1934*

It is beyond peradventure that Narragansett Indian Tribe was not under federal jurisdiction in 1934. The federal government has never claimed to the contrary, nor could it. Its own historical documents consistently assert the historical truth that Tribe has never been under federal jurisdiction. This Court should first consider the BIA's own documents resulting in the federal recognition of the Tribe in 1983. Citing the *Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island*, 48 Fed.Reg. 6177, 6178 (Feb. 10, 1983), the District Court points out that the Determination finds that the "tribe has a documented history dating from 1614," and that the Tribe has existed "autonomously since first contact, despite undergoing many modifications." 290

F. Supp.2d at 181. The history says nothing of federal jurisdiction, and autonomy suggests none ever existed.

The document upon which the final Determination was based, however, is more powerful. The Conclusions and Recommendations reported that "[t]here has been relatively little federal contact with the group" and that "[a] number of inquiries to the Bureau of Indian Affairs between 1880 and 1934 elicited the reply that there was *no Federal responsibility for or jurisdiction over* the group." *General Conclusions, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Narragansett Indian Tribe of Rhode Island*, 48 Fed. Reg. 35747 (at page 7) (August 13, 1982) (emphasis added).

If this were not enough, the actual letters referred to by the Department of the Interior, Bureau of Indian Affairs,[9] are a matter of public record. (Addendum at 5). They show that between 1927 and 1937 the federal government's repeated position was that the Tribe was *not* under federal jurisdiction, thereby foreclosing any argument to the contrary.

In 1927, some seven years before passage of the 1934 Act, the BIA addressed the question of whether the Tribe was under federal jurisdiction. Tribal leader John Noka sent a letter dated April 25, 1927 to the federal Commissioner of Indian Affairs, in which he "request[ed] the Federal Government to take charge of

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[9] It is important to note these documents are authored by the very bodies which are Federal Appellees in this suit.

the affairs of the Narragansett Indians." On May 5, 1927, the Assistant Commissioner responded that:

> The Narragansett Indians are and have been under the jurisdiction of different states of New England. The *Federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs*. . . . [A]ll communications in regard to your affairs should be taken up with the proper state officials.

(emphasis added).

The Assistant Commissioner in a letter dated June 29, 1927 took the same position in another letter to Tribal leader Daniel Sekater. Again on July 19, 1927, the federal government returned to Mr. John Noka a list he provided of Narragansett Indians, again repeating that "[t]he Narragansett Indians are not under the jurisdiction of the Federal Government, and the list is being returned to you for submission to the proper state authorities."

Three years later, on January 11, 1930, the Commissioner of Indian Affairs reiterated:

> Under date of June 29, 1927, you were advised that *the Narragansett Indians have never been under the jurisdiction of the Federal Government* and Congress has never provided any authority for the various Departments to exercise the jurisdiction which is necessary to manage their affairs. They are under the jurisdiction of the different states of New England.
>
> You were further advised that there is no possible way in which this Office could furnish the Narragansett Tribe with any assistance and that all matters in regard to their affairs should be taken up with

proper state officials.

(emphasis added) (Addendum at 5).

The historical conclusion and position of the BIA remained the same in correspondence three years after passage of the 1934 Act. In a letter from the Bureau to Rhode Island Congressman O'Connell dated March 18, 1937, Commissioner Collier replied:

> We have had correspondence directly with Mr. Daniel Sekater relative to this matter. Under date of June 29, 1927, Mr. Sekater was advised that the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs. He was further advised that there was no possible way in which this Office could furnish the Narragansett Tribe any assistance.
>
> *The situation has not changed since the above mentioned letter was written.*

(emphasis added) (Addendum at 5).

As this line of correspondence makes crystal clear, any list of tribes that emphatically were *not* "under Federal jurisdiction" in 1934 must include the Narragansett Indian Tribe.[10] The Federal Appellees did not and could not produce any evidence in the historical record contrary to these records from their own

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[10] The historical fact that the Tribe was not under federal jurisdiction or superintendence at any time since the founding of the republic is further supported by the United States Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. 515 (1832) where the Court noted that the "laws of [Rhode Island] have been extended over [tribes] for the protection of their persons and property." *Id.* at 580.

office. Indeed, a scant three years after passage of the 1934 Act, John Collier, the then-Commissioner of the BIA – who testified for the IRA and proposed the amendment requiring then-existing federal jurisdiction[11] – represented that the lack of federal jurisdiction over the Tribe had not changed since 1927. In other words, neither the 1934 Act, nor any other, provided the BIA with authority or jurisdiction over the Narragansett Indian Tribe. As such, the Secretary may not today take land into trust for the Tribe under the 1934 Act. This conclusion could not be more clear.

2. *Not Federally Recognized in 1934*

The Tribe's lack of federal recognition in 1934 likewise renders it ineligible for trust taking under the 1934 Act. As above, the plain language of the Act requires that a Tribe be federally-recognized in 1934. The District Court bootstrapped the Tribe's receipt of federal recognition in 1983 and applied it back to 1934. 290 F. Supp.2d at 179. The Court then noted that the Tribe was found in 1983 to have been in existence in 1934. From that the District Court held that the Tribe's prior existence and 1983 recognition together met the terms of § 479. Appellants disagree and urge this Court to reject the District Court's reading.[12]

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[11] *See Hearings before the Senate Committee on Indian Affairs,* 73d Cong. 2d Sess., part 2, at 264-66.

[12] Of course, the relating-back on the recognition front is wholly inapplicable to

(continued...)

In sum, State Appellants agree with the trial court that "there can be no serious dispute concerning the Narragansetts' tribal status in 1934." *Id.* at 181. Its undisputed salient features, however, were that the Tribe was not federally recognized in 1934, and the Tribe was not then "under Federal jurisdiction." Therefore, the Tribe does not come within the definition set forth in § 479 of the 1934 Act.

B. The Settlement Act Prohibits the Secretary From Converting the Parcel to Trust

Twenty-five years ago, the State, the Tribe and the Town settled Lawsuits in which the Tribe claimed ownership of and sovereignty over 3,200 acres of land in the State, including the Parcel. Under the terms of the JMOU, a state-chartered corporation controlled by the Tribe received fee title to approximately 1,800 acres of land from the State and private landowners. In exchange, the Tribe gave up its right to assert historical ownership of and sovereignty over land in Rhode Island. Congress blessed the deal by passing the Settlement Act. Everyone got the benefit

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[12](...continued)
the question of whether the Tribe was under federal jurisdiction in 1934. Either the Tribe was or it was not. In other words, the fact that the Tribe existed in 1934, even if somehow related to later federal recognition, has nothing whatsoever to do with whether the Tribe was in 1934 under federal government jurisdiction. The Tribe could both exist *and*, like this Tribe, not have been under federal jurisdiction. Even if recognition is somehow related to a pre-existing status (existence), that existence has nothing to do with whether a tribe was under federal jurisdiction.

of the bargain. The Tribe gained a viable land base, the surrounding landowners got clear title to their property and the State secured a guarantee that its laws and jurisdiction – its sovereignty – would remain complete within its borders.

Converting the Parcel into unrestricted federal trust directly violates the JMOU and the resulting Settlement Act because it divests the State of its sovereignty over the Parcel and allows the federal government, for the first time, to exercise federal superintendence over land in Rhode Island for the Tribe, thereby altering the rights that the parties preclusively settled long ago.

1. *Unrestricted Trust Ousts State Jurisdiction*

Land taken into trust under § 465 is insulated from state and local control in at least three important respects. First, federal Indian trust land becomes "Indian country" for jurisdictional purposes. *Oklahoma Tax Comm'n v. Citizens Band Potowatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511 (1991); *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (lands owned in federal trust for Indian tribes are "Indian country" pursuant to 18 U.S.C. § 1151); *Narragansett Indian Tribe v. Narragansett Electric Co.,* 89 F.3d 908, 920 (1st Cir. 1996) (holding, in dicta, that if the Parcel had been taken into trust, it would have been "Indian country").

"Indian country" is defined as land set aside by the federal government for the use of Indians, which land is under the superintendence of the federal

government. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530-31 (1998). The federal "set-aside" requirement ensures that the land is occupied by Indians while the federal superintendence requirement "guarantees that the Federal government and the Indians involved, *rather than the states*, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 331 (emphasis added); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); *Oneida Indian Nation of New York v. Sherrill*, 2003 WL 21691993 *9 (2nd Cir. July 21, 2003) ("In general, 'Indian country' refers to the geographic area in which tribal and federal laws normally apply and state laws do not."). Indian country is, accordingly, land removed from state civil and criminal jurisdiction.

Second, federal Indian trust land is exempt from state and local taxation. 25 U.S.C. § 465. Third, under the regulations of the Department of the Interior, Indian trust land is generally exempt from state and local land use regulation. 25 C.F.R. § 1.4; *see also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664-66 (9th Cir. 1975). The United States concedes these basic trust attributes.[13]

[13] *See e.g.*, Federal Defendants' Memorandum in Support of Motion for Summary Judgment at 8 (". . . the Bureau noted that, if taken into trust, the 31-acre housing parcel would be subject to primary tribal and federal jurisdiction . . . ") (App. at Tab 24); Federal Defendants' Opposition to the State's Motion for Summary

(continued...)

Thus, it is undisputed that the conversion of land held in fee by a tribe to federal trust means that state law and jurisdiction are preempted by federal law and Indian interests on that land. Properly understood, the fee to trust conversion divests a state of much of its power, authority and dominion over the land – in short, its sovereignty there – and subordinates the state's interests to those of the federal government and the Indians.

2. Congress Extinguished the Tribe's Ability to Claim any Sovereign Territory

When the parties signed the JMOU and when Congress implemented portions of that agreement through the Settlement Act, a special allocation of rights was achieved between the State, the federal government and the Tribe replacing the more conventional "Indian country" template which might otherwise have governed that allocation. Allowing the Secretary to take land into trust for the Tribe disrupts the special balance of powers negotiated by the parties and implemented by Congress through the Settlement Act.

The Settlement Act gave the Tribe a viable land base and a locus for the

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(...continued)
Judgment at 5-6 ("in fact, in those states that are not "P.L. 280" states, it is well-settled that transfer of off-reservation tribally owned land into trust effects a shift away from primary state jurisdiction to primary tribal and federal jurisdiction.") (App. at Tab 25).

exercise of its retained sovereignty over its members.[14] The Settlement Act gave the Tribe (through a state-chartered corporation established for the purpose), and not the federal government, control over the management and disposition of the Settlement Lands, thus achieving tribal independence from the federal government that was unusual for the time. The State bargained for and obtained a guarantee that its laws and jurisdiction – and not that of the federal government or any Indian tribe – would continue to apply throughout the State, including on the Settlement Lands.[15] For its part, the federal government was relieved of any further duties and liabilities to the Tribe, foreclosing the conventional dependency that had characterized Indian relations with the United States. The effect of the Settlement Act was to establish an allocation of power that continued a long history of Narragansett independence from the federal government, left Tribal sovereignty over its members and internal governance intact and permitted Tribal lands to be subject to the regular application of State law.

a. Aboriginal title extinguished

Congress accomplished this allocation of power in the Settlement Act by

[14] *See State v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) (holding that the Tribe possesses retained sovereignty over members and internal tribal matters); *Narragansett Indian Tribe v. State*, 2003 WL 23018759, *14-15 (D.R.I. December 29, 2003) (separating Tribal sovereignty over self-governance from Tribal sovereignty over land).

[15] 25 U.S.C. § 1708 ("the Settlement Lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island").

creating a two-pronged, all encompassing extinguishment of potential Indian claims within Rhode Island. With the first prong, Congress terminated all aboriginal title throughout the State. 25 U.S.C. § 1705(a)(2) (extinguishing Narragansett aboriginal title everywhere within the United States and all other Indian tribes' aboriginal title within Charlestown); 25 U.S.C. § 1712(a)(2) (extinguishing all other Indian tribes' aboriginal title in Rhode Island outside of Charlestown).

Aboriginal title describes a unique interest in property. Like conventional fee ownership, aboriginal title permits the holder to use and occupy the subject property. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) (aboriginal title is a possessory interest in land); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 n.6 (1st Cir. 1975) ("Indian title, also called 'right of occupancy,' refers to the Indian tribes' aboriginal title to land which predates the establishment of the United States"); *see also* Felix Cohen, *Handbook of Federal Indian Law*, 488-89 (1982 ed.) (Aboriginal Indian title "represents the perpetual right of use and occupancy . . . virtually equivalent to a fee interest . . . ").

Unlike conventional fee ownership, however, when a tribe claims aboriginal title, by necessary implication it is asserting territorial sovereignty over that land. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (the United States

protects aboriginal interest in lands against intrusion by third parties, including the states); *Alaska v. Native Village of Venetie Tribal Government,* 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J. concurring) ("the assertion of § 1151[16] sovereignty over territory is a claim which is necessarily based on aboriginal title"), *rev'd on other grounds,* 522 U.S. 520 (1998); *cf. Native Village of Eyak v. Trawler Diane Marie,* 154 F.3d 1090, 1093-96 (9th Cir. 1998) (aboriginal title is not just a mere claim of land ownership ("dominium") but also includes a broader right to governmental powers of regulation and control over the land ("imperium")). In other words, when a tribe claims aboriginal title, it seeks to effect an ouster of a state's sovereign interest in that land and to subordinate that interest to those of the tribe and the federal government. Thus, the extinguishment of the Tribe's aboriginal title under the Settlement Act's first prong prohibits the Tribe from asserting territorial sovereignty over land in Rhode Island and bars the resultant ouster of the State's sovereignty.

b. All claims, interests and rights over land extinguished

With the second prong, Congress effected an even broader, more powerful preclusion by extinguishing any claims by any tribe, including the Narragansetts, or any "successor in interest" against the State (or anyone else) based upon "*any*

[16] Section 1151 is the statutory codification of Indian country. *See infra* note 28 and accompanying text.

interest in or right involving land" in Rhode Island. 25 U.S.C. § 1705(a)(3) (extinguishing Narragansett and successor rights and interests in land anywhere in the United States); 25 U.S.C. § 1712 (a)(3) (effecting precisely the same extinguishment of other tribes' land rights and interests in Rhode Island).

With respect to the Narragansetts, and any successor in interest, the Settlement Act specified:

> By virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, *all claims* against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and *based upon any interest in or right involving such land* or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) *shall be* regarded as *extinguished* as of the date of the transfer.

25 U.S.C. § 1705(a)(3) (emphasis added).

Under this second prong, the Tribe is precluded from making a claim that its laws, rather than State laws, apply on Tribal land anywhere in the State. Such an assertion is a claim of right (sovereignty) involving land in Rhode Island. As such, that claim is specifically barred by the Settlement Act.

The Settlement Act's extinguishment of aboriginal title in 1705(a)(2) and 1712(a)(2) alone protects the applicability of the State's civil and criminal laws and jurisdiction over all land in Rhode Island, including the Parcel. If this were not

enough, Sections 1705(a)(3) and 1712(a)(3) of the Settlement Act put an end to any argument that any tribe may claim territorial sovereignty in Rhode Island.[17]

The Settlement Act not only bars the Tribe from making such a claim, it also bars the federal government from making the same claim on the Tribe's behalf. It does so by extinguishing the right of any "successor in interest" to the Tribe to make a claim against the State "based upon any interest in or right involving land [in Rhode Island]." 25 U.S.C. § 1705(a)(3). When the Secretary converts Tribal fee land to federal trust property, she becomes the Tribe's successor in (fee title) interest to the Parcel and she is, thus, bound by the broad extinguishment provisions of the Settlement Act. In addition, the Settlement Act also contains a separate and independent prohibition against the United States from eclipsing the State's sovereignty on behalf of any Indian tribe:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706 and 1707, of this title, the United States shall have no

[17] The District Court held that nothing in the Settlement Act precluded the Secretary from converting the Parcel to trust. The District Court reasoned that "the Settlement Act was limited in scope to a resolution of the Narragansetts' claims of aboriginal rights to lands. It did no more." *Carcieri v. Norton*, 290 F. Supp.2d at 190. As discussed above, the Settlement Act need not have done more because the extinguishment of aboriginal title alone forecloses Indian claims against title to and sovereignty over land. Even assuming, as the District Court appears to have done, that aboriginal title is nothing more than a fee claim to land, the Settlement Act did more – much more – than simply eliminate the Narragansetts' claims of historical fee ownership to land. The District Court either ignored or treated as surplusage, Congress' second, more extensive, multi-party, extinguishment: Indian (or successor) claims based upon any interest in or right involving land in Rhode Island. The District Court's failure to recognize that the Settlement Act does much more than eliminate Indian fee title claims to land is clear error.

> further duties or liabilities under [the Rhode Island Indian Claims Settlement Act] with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands . . .

25 U.S.C. § 1707(c).

This section separately prevents the United States from doing indirectly what Congress, through the Settlement Act's broad extinguishment provisions, prohibits any Indian tribe from doing directly: effecting an ouster of the State's jurisdiction over its land. In order to prevent such an ouster, the Act places a prospective limitation on the federal government's ability to divest state sovereignty by placing land into trust for the Tribe. The Secretary can no more assert a claim that the Parcel is Indian country than the Tribe can.

Accordingly, the Tribe's asserted right to or interest in exercising territorial sovereignty in Rhode Island has been foreclosed by Congress outside the Settlement Lands just as it has been within the Settlement Lands. Likewise, the Tribe's right to invoke the federal government's protection against the uniform application of the State's laws to land anywhere in Rhode Island has been foreclosed by Congress.

All of these provisions of the Settlement Act make sense. They ensure that when the Tribe agrees to be bound by State law and jurisdiction on the Settlement Lands – the very core of its ancestral domain – it will not enjoy greater territorial sovereignty outside that domain. They ensure that State law will apply to tribally-

held land in Providence just as it does on the Tribe's homeland on the other side of the State. They ensure that the Settlement Lands will not, one day, be the only tribal land in Rhode Island subject to State law and jurisdiction.

3. ANCSA, not the Mashantucket Act, is the Relevant Precedent

In 1971 Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* ("ANCSA"). ANCSA marked a shift in federal Indian policy away from "paternalistic federal oversight" and towards Native American self-determination. The 1978 Rhode Island Settlement Act is a part of that movement and must be interpreted consistent with an overall policy favoring tribal self-regulation over federal superintendence, independence over dependence.

In *Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 533-34 (1998), the Supreme Court held that ANCSA prohibited traditional federal jurisdiction and federal control over Indian lands in Alaska. It confirmed that ANCSA was intended to be a departure from traditional Indian policy: "[ANCSA] attempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them sovereign entities for some purposes but as sovereigns without territorial reach." *Id.* at 527 *citing with approval, Alaska v. Native Village of Venetie Tribal Gov't,* 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, concurring). As a result, the Court held that Alaska Native lands are not "Indian country" and, accordingly, are not protected from the reach and

application of state law and jurisdiction. *Venetie*, 522 U.S. at 530-35.

Although ANCSA does not specifically address the allocation of powers between the state, the federal government and the tribes, the Court held that ANCSA necessarily prohibits federal jurisdiction and control ("superintendence") over tribal lands, fosters native independence by allowing tribes to make decisions about the disposition of their land and declined to set Alaskan Natives apart by artificially protecting their land from the imposition of state civil and criminal laws. In other words, ANCSA put an end to Indian country in Alaska. The Court found the following factors to be dispositive in reaching this conclusion:

* ANCSA was a comprehensive statute designed to settle all land claims by Alaska Natives. *Id.* at 523.

* In enacting ANCSA, "Congress sought to end the sort of federal supervision over Indian affairs that had previously marked federal Indian policy." *Id.* at 523-24.

* ANCSA completely extinguished all aboriginal claims to land in Alaska. *Id.* at 524.

* Federal funds and land were transferred by the federal government to state-chartered private business corporations, formed pursuant to state statute. All of the shareholders of these corporations were Alaska Natives. *Id.*

* The ANCSA corporations received title to these lands in fee simple, without the application of a federal restraint on alienation. *Id.*

* The state-chartered corporations ultimately transferred title to fee land to the Tribal governments. *Id.*

The combined effect and meaning of these provisions was explained by

Judge Fernandez as follows:

> If ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members. As far as the land was concerned, the regular state and federal political entities would have and retain the necessary power. In short, it was no longer necessary to explicate and mull over previous Indian country concepts. That was the promise of the new era. When Congress did all of that, it created something rather different, rather unique, rather simple and yet rather daedalian.

101 F.3d at 1304 (9th Cir. 1996) (Fernandez, concurring), *rev'd on other grounds*, 522 U.S. 520 (1998).

The Rhode Island Settlement Act was modeled, in relevant part, on ANCSA.[18] Indeed, precisely the same factors that compelled the Supreme Court to prohibit federal Indian superintendence over land in Alaska are present in the Rhode Island Settlement Act:

* The Rhode Island Settlement Act was also a comprehensive act designed to settle all claims of all tribes to any land in Rhode Island. 25 U.S.C. §§ 1705(a)(2), (3) and 1712(a)(2), (3).

* In enacting the Rhode Island Settlement Act, Congress specifically prohibited the Secretary from any further duties or liabilities to the

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[18] And finally, the bill is important in that it follows the precedent set in the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq*., by providing the Indians with an opportunity to acquire a viable land base in the process of resolving their claims to aboriginal lands." * * * The position was that this language was consistent with the extinguishment language used in ANCSA, 43 U.S.C. 1603(b), and that ANCSA instituted the relevant precedent for extinguishment in a settlement context.

House Report (Interior and Insular Affairs), H.R. Rep. No. 95-1453, at **1951, 1953 (1978).

Tribe. 25 U.S.C. § 1707(c)).

* The Rhode Island Settlement Act completely extinguished all aboriginal claims to land in Rhode Island. 25 U.S.C. §§ 1705 and 1712.

* Settlement Lands were transferred to a state-chartered corporation formed pursuant to state statute. 25 U.S.C. § 1707(a). The majority of members of the corporation's board were selected by the Tribe. 25 U.S.C. § 1706 (a)(1) and (2).

* The corporation received the Settlement Lands in fee simple with no initial restraint on alienation. 25 U.S.C. § 1707(c)).

* The corporation ultimately transferred the land to the Tribal government itself. Statement of Facts at ¶ 16; 290 F. Supp.2d at 170.

The corporate model for the resolution of land claims was a dramatic departure from prior Indian settlements approved by Congress. It made ANCSA a model for future self-determination acts, including Rhode Island's. By completely extinguishing aboriginal title and all other interests, rights and claims, both ANCSA and the Rhode Island Settlement Act foreclosed Indian claims against land based on use and occupancy and barred any protections the federal government could provide against application of state laws and jurisdiction. By providing a land base but putting it in the hands of tribally-controlled state corporations, rather than under the thumb of the federal government, Congress "sought to maximize the participation of Natives in decisions affecting their rights and property." *Alaska v. Native Village of Venetie Tribal Government*, 1995 WL 462232 *17 (D. Alaska, August 2, 1995), *rev'd* 101 F.3d 1286 (9th Cir 1996), *rev'd*

522 U.S. 520 (1998).

> . . the corporate settlement model leaves Alaska Natives with collective control of their lands and what should be done with them. That control is by and large in the hands of a board of directors, a management group made up from the Native communities themselves who must exercise collective judgment as to how to deal with the land grants and money. The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the land which they occupied after extinguishment of aboriginal titles. The court finds that this corporate model effects a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes.

Id. at 16.

Both ANCSA and the Rhode Island Settlement Act, albeit in different words, expressly declared Congress' intention not to have an ongoing guardian-ward relationship with the Indians covered by the settlement act. With respect to the Alaska settlement, Congress said:

> The settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially-defined institutions, rights, privileges, or obligations, *without creating a reservation system or lengthy wardship or trusteeship,* and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States and the State of Alaska.

43 U.S.C. § 1601(b) (emphasis added).

Congress said precisely the same thing in the Rhode Island Settlement Act, but used fewer words:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands . . .

25 U.S.C. § 1707(c).

The purpose of ANCSA is clear and has been decisively determined by the Supreme Court: to settle all Indian claims within the state; to provide tribes with a viable land base; to foster self-determination by freeing tribes from congressional and executive agency domination; to end the paternalistic protections that had been the hallmark of federal Indian policy, including exempting Alaska Natives from state civil and criminal laws by cloaking their land with the "Indian country" mantle.

The import of the Rhode Island Settlement Act is no less clear. By extinguishing aboriginal title throughout the State as well as all other claims, by providing the Tribe with a land base, by giving the Tribe collective control over the land base through a state-chartered corporation and by disavowing further federal duties or liabilities in connection with the Tribe, Congress reaffirmed for Rhode Island precisely the allocation of powers between the federal government and the Tribe as it created, from whole cloth, in Alaska. In sum, the Rhode Island Settlement Act, like ANCSA, prohibits the kind of dependent, subordinated relationship with the federal government that federal Indian trust necessarily

brings.

Rather than look to ANCSA and the decisions construing it for guidance, the District Court placed heavy reliance on the Second Circuit's construction of the Mashantucket Pequot Indian Land Claims Settlement Act, 25 U.S.C. § 1601, *et seq*. (the "Mashantucket Settlement Act") in *Connecticut ex rel. Blumenthal v. United States*, 228 F.3d 82 (2nd Cir. 2000) to support its contention that the Secretary can take the Parcel into trust. The District Court's reliance is misplaced.

A comparison of the Mashantucket and Rhode Island Settlement Acts is instructive and demonstrates that, as to the allocation of power between the State, Indian tribes and the federal government, Rhode Island is closer to Alaska than Connecticut.

The Mashantucket Settlement Act bears scant legal resemblance to Rhode Island's Settlement Act. The Mashantucket Settlement Act is parochial where the Rhode Island Settlement Act is broad. The Mashantucket Act embraces older notions of Indian dependency that the Rhode Island Act, like ANCSA, categorically rejects. The Mashantucket Act *requires* the federal government to convert and hold land in trust for the Mashantuckets, the Rhode Island Act allowed the Narragansetts to control their own land. The Mashantucket Act shelters the Mashantuckets from state law. The Rhode Island Act affirmatively applies state law and jurisdiction. Connecticut relinquished a measure of its sovereignty to the

federal government and the Mashantuckets. Rhode Island relinquished none.

The purpose of the Mashantucket Settlement Act was to allow that tribe to add to its existing reservation. *Blumenthal,* 228 F.3d at 87 ("The general purpose of the [Mashantucket] Settlement Act is plain. After defining the land comprising the Indian's reservation, the Settlement Act provides a mechanism whereby the Mashantucket Pequot tribe *is able to add property to its reservation*." (emphasis added)). The Narragansetts had no federal reservation at the time of the Rhode Island Settlement Act and that Act did not create one. Indeed, the 1,800 acres of land provided to that Narragansetts is consistently described by Congress as Settlement Lands only, and never as a reservation.

As its name suggests, the Mashantucket Settlement Act contained a state-wide claims extinguishment applicable to just one of a number of tribes in Connecticut. The Rhode Island Settlement Act extinguished *all* Indian claims to land in Rhode Island. From the perspective of state sovereignty, the Mashantucket Act was, indeed, "parochial," *Blumenthal,* 228 F.3d at 90. No other tribe's rights to make claims against Connecticut (outside Ledyard) were affected by the Mashantucket Act. The Rhode Island Settlement Act, on the other hand, ensured that Rhode Island's laws and jurisdiction – its sovereignty – would be complete and co-terminus with its borders by extinguishing aboriginal title as well as any and all claims based upon any interest in or right involving land in Rhode Island.

Moreover, notwithstanding an extinguishment of aboriginal title for one tribe similar to Rhode Island's, 25 U.S.C. § 1753 (b), the Mashantucket Act itself also *required* certain land to be converted to trust by the Secretary and, with respect to the land so converted, deemed it "Indian country," an undisputed ouster of state sovereignty that was bargained for and accepted by the State of Connecticut. 25 U.S.C. § 1755. The Rhode Island Act contains no involuntary diminution or ouster of its law or jurisdiction whatsoever.

The Mashantucket Settlement Act placed a restraint on the alienation of the Mashantucket's land. 25 U.S.C. § 1757(a). The Rhode Island Settlement Act placed no restraint on land held by the state chartered corporation. 25 U.S.C. § 1707(c).[19]

The Mashantucket Settlement Act placed Mashantucket land under the direct control (superintendence) of the United States. 25 U.S.C. § 1754(a) (establishing a Mashantucket Pequot Settlement Fund (the "Fund") to be held in trust by the Secretary for the benefit of the Mashantucket Pequots);
§ 1754(b)(3)(B) (requiring the Tribe to submit an economic development plan for approval by the Secretary); § 1754(b)(7) (requiring lands purchased by the

[19] While the Settlement Lands were conveyed to the state-chartered corporation without a restraint on alienation, the Secretary was required to approve of any disposition of the Settlement Lands if and when the Tribe achieved federal recognition. This conditional executive branch approval of land transfers hardly rises to the level the conventional restraint on alienation imposed by Congress on tribes over which it preserves a traditional guardian-ward relationship.

Secretary with the monies from the Fund to be held in trust by the United States for the benefit of the Mashantucket). The Rhode Island Settlement Act, on the other hand, placed control over the Settlement Lands in the hands of a state-chartered corporation controlled by members appointed by the Tribe. 25 U.S.C. § 1706(a)(1), (2).

Thus, the Mashantucket Settlement Act, unlike the Rhode Island Settlement Act, actively authorized and encouraged the enlargement of Indian country in Connecticut. The usurpation of state sovereignty prohibited in Rhode Island and Alaska was embraced by Connecticut and the language of the Mashantucket Settlement Act reflects that difference.

There is only one provision of the Mashantucket Settlement Act that has any relevance to the Rhode Island Settlement Act. That section reads as follows:

> (8) Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, *and the United States shall have no further trust responsibility with respect to such land and natural resources.*

25 U.S.C. §1754 (b)(8) ("Section (b)(8)") (emphasis added).

Section (b)(8) was construed by the Second Circuit as an absolute prohibition against trust conversions of land purchased by the Fund outside the settlement lands. *Blumenthal,* 228 F.3d at 88 (construing Section (b)(8) language as a prohibition against the Secretary converting land purchased by the Fund

outside the settlement lands into trust). The Rhode Island Settlement Act contains a similar though substantially broader prohibition against federal entanglement:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation or the settlement lands. . .

25 U.S.C. § 1707(c).

Once the Secretary accepted the assignment of certain options to purchase land (§ 1704), once the Secretary published a finding that Rhode Island had enacted legislation creating a state-chartered corporation authorized to acquire, perpetually manage and hold the Settlement Lands (§§ 1705 and 1706) and once the Settlement Lands were purchased and transferred to the State Corporation (§ 1707), then under the Rhode Island Settlement Act, the United States had fulfilled all of its obligations to the Tribe, the Settlement Lands and the State Corporation and was prohibited from any further duties with respect to them. 25 U.S.C. § 1707(c).

One such duty to the Tribe foreclosed by the Rhode Island Settlement Act is any further trust responsibility. In other words, the prohibition against federal trust entanglement that the Second Circuit found applicable to one small piece of land in Connecticut under the Mashantucket Act is applicable to the entire State of Rhode Island under its Settlement Act.

In trying to use the Mashantucket Settlement Act as a model for interpreting Rhode Island's Settlement Act, the District Court missed the forest for the trees.[20] It keyed into nearly identical language in the preamble of both acts describing the 1976 filing of both the Mashantucket and Narragansett lawsuits, the similar effect that both lawsuits had on their respective surrounding communities, the shared desire of Congress and both Rhode Island and Connecticut to remove the resultant clouds on title and the necessary congressional implementation of both settlement agreements. *Carcieri v. Norton,* 290 F. Supp.2d at 185-86.

While it is true that the preamble to both settlement acts indicate a resolution of Indian lawsuits that were detrimental to surrounding property owners and required federal implementing legislation, the similarities stop there. The Second Circuit's conclusion – that "[n]othing in the Mashantucket Act indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign

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[20] The District Court also misapplied the Supreme Court's most recent case on the canon of Indian construction, *Chicasaw Nation v. United States,* 534 U.S. 84, 93-94 (2001). The Court cited the case for the proposition that "statutes are to be construed liberally in favor of Indian with ambiguous provisions interpreted to their benefit." In fact, the case holds the opposite. *Chickasaw* softened that once rigid pro-Indian canon of construction in favor of a more particularized approach, allowing other canons of construction to offset the pro-Indian canon, where warranted. One such offset may occur where, as here, the interpretation of a congressional statute, as opposed to a treaty is at issue. *Id.* at 95. Another is when the pro-Indian canon would require the court to treat words in a statute as "surplusage." *Id.* at 94. Proper application of *Chickasaw* would have required the District Court to interpret the Rhode Island Settlement Act more thoroughly and without treating the Act's two-pronged extinguishment as mere surplusage.

territory"[21] – is inapplicable to the Rhode Island Settlement Act. By its express terms, the purpose of the Mashantucket Settlement Act was to create a federal Indian reservation in Connecticut for one tribe. The only question before the Second Circuit was the placement of the boundaries, if any, of that sovereign territory. By contrast, there was no Tribal sovereign territory in Rhode Island and the Rhode Island Settlement Act created none. Instead, it created Settlement Lands which, far from being sovereign Indian territory, were corporately held lands subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. 25 U.S.C. §1708(a).

The Mashantucket Settlement Act's profoundly different treatment of the relationship between the State, the Tribe and the United States serves as no model for the construction of the Rhode Island Settlement Act. Instead, this Court must look to ANCSA, with its preservation of both tribal and state sovereignties and its active diminishment of the paternalistic role of the federal government towards Indian tribes as the applicable textual and policy model.[22]

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[21] *Blumenthal*, 228 F.3d at 90.

[22] Moreover, applying ANCSA as a model is consistent with prior decisions of this Court and its district courts which uphold the retained sovereignty of the Narragansetts, as a people, to make and enforce their own substantive laws on internal matters, including matters such as membership, inheritance, and the regulation of domestic relations. *State v. Narragansett Indian Tribe,* 19 F.3d 685, 701 (1st Cir. 1994); *see also Narragansett Indian Tribe v. State,* 2003 WL 23018759, *15 (D.R.I. December 29, 2003) (discussing Narragansett sovereignty in Rhode Island as adhering to the self-governance of its people and not its land).

4. The 1976 Lawsuits Settled the State's Jurisdiction Over the Parcel

There is no more compelling case for the enforcement of settlement agreements than when those agreements touch and concern interests in land. *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) ("The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water."). Regardless of the allocation of sovereignty between the State, the Tribe and the federal government set forth in the Settlement Act, the Parcel's jurisdictional fate was sealed when the Tribe settled its aboriginal claims to the Parcel in the 1978.

As discussed previously, the Tribe's Lawsuits against the State, the Town and private property owners was based on its claim of aboriginal title to 3,200 acres of land in Rhode Island. The Parcel was among the land claimed by the Tribe in the Lawsuits. Winning the Lawsuits would have given the Tribe fee title to the 3,200 acres good against all but the United States as well as the right to apply its laws, to the exclusion of State law, on those aboriginal title parcels. Had it won the Lawsuits, the Tribe would have had 3,200 acres of Tribal sovereign territory in Rhode Island and its territorial sovereignty would have extended over the Parcel. The Tribe, however, did not win the Lawsuits. It dismissed them with prejudice as part of a comprehensive settlement of the claims therein. The terms of

that settlement (the JMOU) govern the allocation of Tribal and State rights to land in the disputed 3,200 acre area, including the Parcel.

Under the terms of the JMOU, a Tribally-controlled state-chartered corporation received fee title to 1,800 acres within the disputed area. Fee title in the other 1,400 acres remained with the defendant property owners, including the Whipples, the then-owners of the Parcel. With respect to any right to the exercise sovereignty over the 3,200 acres, there was also an agreed-upon allocation. State law and jurisdiction would apply on the 1,800 acres but the corporation would, nevertheless, be exempt from certain State hunting and fishing regulations applicable in the rest of the State. 25 U.S.C. §1706(a)(3). The Settlement Lands would also enjoy a general exemption from federal, state or local taxation. 25 U.S.C. § 1715(a). With respect to the remaining 1,400 acres outside the Settlement Lands, the Tribe *relinquished its claimed interest in the exercise of its sovereignty over those lands* just as surely as it gave up its fee title interest there. Fee title in the 1,400 acres outside the Settlement Lands remained with the defendant property owners, including the Whipples, while the exercise of sovereignty over that area remained with the State and the Town.[23]

[23] It is worth noting that the State of Rhode Island signed the JMOU twice, once as the sovereign (JMOU at 4, signature of the Governor of the State of Rhode Island, Addendum at Tab 3) and once as the actual fee title owner of property that was the subject to the claims set forth in the lawsuit. (JMOU at p. 4, signature of the Department of Environmental Management, Defendant Addendum at 3). This further shows that two interests were settled; title to the land and sovereign

(continued...)

After settling on that basis, the State's jurisdiction over these 3,200 acres and over the Parcel itself cannot now be stripped either directly (by instating aboriginal title to the Parcel) or, as here, indirectly (by purchasing the land in fee simple and transferring it to the federal government to hold in trust). Either result vitiates the settlement agreement of the parties (the JMOU).[24]

5. *Any Trust Must Preserve State Laws and Jurisdiction*

Even if the Settlement Act could somehow be read to allow the Secretary to take land into trust on behalf of the Tribe, the Secretary can only take the Parcel into trust subject to the State's civil and criminal jurisdiction.

(...continued)
jurisdiction over it. If just fee title were at stake, DEM's signature would have been sufficient.

[24] The District Court rejected the argument that principles of *res judicata* bar the Secretary's fee to trust conversion because the United States was not a party to the 1976 Lawsuits and the Tribe is not a party here. *Carcieri, 290* F. Supp.2d at 186. The United States was no stranger to the deal between the Tribe, the State and the Town. Indeed, it was and is inextricably bound up in the special arrangement between the State and the Tribe. First, the United States was a participant in the Settlement Agreement because federal legislation was a *required* element of any settlement. Second, regardless of the terms of the Settlement Act, the United States maintains a special relationship with the Tribe. As such, they are a legal unity; the United States may not do for the Tribe that which the Tribe itself is prohibited from doing. Legal restrictions on the Tribe likewise restrict the United States. *See, e.g.*, 25 U.S.C. § 1707(c) (prohibiting the United States from further duties or liabilities to the Tribe); 25 U.S.C. §§ 1705, 1712 (barring the Secretary as "successor in interest" to the fee title interest in the Parcel from making any claims based on any right to or interest involving land in Rhode Island). These provisions of the Settlement Act, indicate that the Secretary was a party to the deal and is required to abide by its terms.

The only way to harmonize the Secretary's desire to take land into trust for the Tribe with the congressional mandate extinguishing Indian claims against the State based upon any "interest in or right involving" land in Rhode Island is to ensure that the trust does not violate, in any measure, the State's territorial sovereignty. Such a conversion would not violate the State's territorial sovereignty only if State law and jurisdiction were expressly preserved in any trust acquisition on the face of the deed itself. In other words, even if the Secretary could take land into trust (the State adamantly believes the Settlement Act prohibits such a conversion), such a conversion must be subject to Rhode Island civil and criminal laws and jurisdiction – just as the Settlement Lands are so subject.

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C. Taking the Parcel into Trust Violates State Sovereignty Under the Constitution

Taking the Parcel into unrestricted trust is not only illegal after passage of the Settlement Act, the action also violates the United States Constitution's protection of the State's territorial sovereignty.

The Secretary proposes to diminish the sovereign territory of the State without its consent in violation of art. I, § 8 cl. 17 and art. IV § 3 of the United States Constitution, and the Tenth Amendment thereto. The imposition of a federal trust on the Parcel pursuant to 25 U.S.C. § 465 is for the purpose and effect of excluding the State's civil and criminal jurisdiction in favor of another sovereign

pursuant to 18 U.S.C. § 1151. This action will therefore diminish the sovereign jurisdiction and territorial integrity of the State.

The creation of a territorial enclave for another sovereign, to the exclusion of the State's jurisdiction without consent, is a violation of the State's retained sovereignty. Neither the Tribe, nor the federal government acting on its behalf, possesses such power. Moreover, Congress does not have the authority under its article I Indian Commerce Clause power to diminish state sovereignty. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The federal government's attempt to take the Parcel into unrestricted trust is therefore unconstitutional.

1. *Rhode Island's State Sovereignty*

Rhode Island's history as a colony, as a sovereign acquiring all the rights of the Crown, and as a sovereign state in the Union, coupled with its historical relationship to the Tribe put the State's constitutional concerns in sharp focus.[25] Rhode Island as a colony maintained jurisdiction over its land from the earliest times.[26] Upon declaring independence in 1776, Rhode Island "succeeded to the

[25] This history can be found in several sources. *See In re Narragansett Indians*, 40 A. 347 (R.I. 1898); State of Rhode Island and Providence Plantations, "*Narragansett Tribe of Indians, a Report of the Committee of Investigation, an Historical Sketch, and Evidence Taken made to the House of Representatives 1880-1883*" (hereafter "Report of Comm.") E. L. Freeman, Providence, 1880-1883.

[26] *See In re Narragansett Indians*, 40 A. at 361; *Report of Comm.* (1880 ed.), at 18 (since earliest colonial times, the State has maintained jurisdiction throughout the State); 1663 Charter by King Charles to Rhode Island (providing authority "to

(continued...)

rights of the colony and the rights of the crown, and still holds them, unless surrendered . . . under the constitution. . . ." *In re Narragansett Indians*, 40 A. at 361. Thus, Rhode Island (unlike most states)[27] entered the union with its sovereign territorial jurisdiction and territorial boundary intact – a jurisdiction which has been maintained to this very day.

Initially the term "Indian country" meant "sovereignty," where the aboriginal government still retained title to the land to the exclusion of state

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direct, rule, order and dispose of all other matters and things" relative to "the native Indians").

[27] The "United States never held the fee title to Indian lands in the original states as it did to almost the rest of the continental United States and that fee title to Indian lands in States, or the pre-emptive right to purchase from Indian was in the States." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). When the westward expansion of this country ended, the Indian tribes could not be moved any further west. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). "Congress's solution . . . was to make new Indian reservations enclaves of exclusive federal jurisdiction." Matal at 295. Consent of new states – often in the form of a cession of jurisdiction over Indian lands in the state's enabling act – was required prior to their being admitted to the union in order to preserve the jurisdictional status of these federal enclaves. *See Cramer v. United States*, 261 U.S. 219, 228 (1923). The state would then include a clause in its constitution authorizing exclusive federal jurisdiction over tribal territory. *See* Wyo. Const. of 1890, art. 21 § 26 (disclaiming all right and title to Indian lands within the state until extinguished by Congress). This practice of requiring the cession of jurisdiction by a new state over Indian lands became routine after mid-century. *See, e.g.*, Alaska Statehood Act of 1958, Pub.L. No. 85-508, § 1, 72 Stat. 339, 339; Arizona Statehood Act of 1910, ch. 310, 36 Stat. 557, 569; Kansas Statehood Act of 1861, ch. 20, 12 Stat. 126, 127; Montana Statehood Act of 1889, ch. 180, 25 Stat. 676, 677; New Mexico Statehood Act of 1910, ch. 310, 36 Stat. 557, 558-59; Oklahoma Statehood Act of 1906, ch. 3335, § 1, 34 Stat. 267, 267; Utah Statehood Act of 1894, ch. 138, 28 Stat. 107, 108; *see also* Idaho Const. of 1890, art. 21, § 19.

jurisdiction. *Worcester v. Georgia*, 31 U.S. 515, 583 (1832). The definition of "Indian country" developed during the period of the General Allotment Act policy through a series of Supreme Court decisions, none of which stand for the proposition that a state's jurisdiction may be withdrawn from a parcel of land without its consent. *See United States v. McGowan*, 302 U.S. 535, 537-39 (1938); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Donnelly v. United States*, 228 U.S. 243 (1913); *see also* Matal, at 308-14 (discussing these cases).[28] *Worcester*, however, recognized that, even at that early date, the "laws of [Rhode Island] have been extended over [tribes] for the protection of their persons and property." 31 U.S. at 580. Simply put, land in Rhode Island is subject to the State's civil and criminal laws and jurisdiction.[29]

2. *Principles of Federalism Preclude the Secretary's Action*

When the independent states formed this nation, they "entered the federal

[28] Congress codified the case law definition of "Indian country" under § 1151 to mean: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

[29] The only exception to this is by the consent of the State not to apply its laws to certain federal lands. R.I. Gen. Laws § 42-1-2. *See infra* note 30.

system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (recognizing "presupposition of our constitutional structure"). While "the Constitution establishe[d] a National Government with broad, often plenary authority over matters within its

recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (citing *Seminole Tribe*, 517 U.S. at 71 n.15). The recognition of the states as sovereign entities is found in the structure of the Constitution, which contains essential postulates that maintain the governmental system of dual sovereignty. *Printz v. United States*, 521 U.S. 898, 918 (1997); *see Alden*, 527 U.S. at 729 (foremost in constitutional provisions is the "presupposition . . . that each State is a sovereign entity in our federal system.") (internal citations omitted).

In addressing the issue of whether particular sovereign powers have been granted by the Constitution to the federal government or have been retained by the states under the Tenth Amendment, the United States Supreme Court has stated that:

> [t]hese questions can be viewed in either of two ways. In some cases the court has inquired whether an Act of Congress is authorized by one of the powers delegated to the Congress in Article I of the Constitution. … In other cases, the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the 10th Amendment. . . . [T]he two inquiries are mirror

> images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. . . . The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power.

New York v. United States, 505 U.S. 144, 155-57 (1992) (internal citations omitted); *see also Seminole Tribe*, 517 U.S. at 59-64 (Indian Commerce Clause does not grant Congress power to abrogate state sovereignty).

The Court has also determined under the Tenth Amendment that:

> [a]lthough the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion 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."

Printz, 521 U.S. at 918-19 (emphasis added).

Two provisions of the Constitution are particularly relevant: art. I, § 8, cl. 17 (the "Enclave Clause") and art. IV, § 3 (the prohibition on involuntary reduction of a state's sovereign territory). Both reflect fundamental respect for the integrity

of a state's sovereign territorial jurisdiction and both prohibit the federal government from unilaterally diminishing a state's sovereign territory.

a. The Enclave Clause prohibits the Secretary's action

The Enclave Clause provides Congress the authority:

> To exercise exclusive Legislation in all Cases whatsoever, . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, arsenals, dock-Yards, and other needful Buildings.

U.S. Const. art. I, § 8, cl. 17 (emphasis added).

The Enclave Clause allows Congress to exercise "exclusive legislative" authority over certain property, but *only* with the consent of the affected state.[30] "Exclusive legislation" within the Enclave Clause has been defined as the equivalent power of "exclusive jurisdiction." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930). Although Congress has unique plenary authority, the Enclave Clause maintains the jurisdictional integrity of both federal and state sovereignty.[31] Where a state does not consent, it nonetheless retains limited

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[30] The State has not consented to the withdrawal of its jurisdiction, which "extend[s] to and embrace[s], all places within the boundaries thereof, except as to those places that have been ceded to the United States or have been purchased by the United States with the consent of the state." R.I. Gen. Laws § 42-1-2.

[31] "To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as a prophylactic against undue state interference with the affairs of the federal government. Yet, ever sensitive to the risk of granting the federal government unchecked power, *the founders limited and balanced this federal grant of power by requiring state consent to the federal*

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jurisdiction to the extent the exercise of such jurisdiction will not interfere with the federal government's intended use of the property. *See Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528-30 (1938) (concurrent or partial federal-state legislative jurisdiction); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937) (same).

The Enclave Clause requires the consent of the State for the federal government to obtain exclusive jurisdiction over the Parcel. Congress possesses exclusive authority over matters involving Indian tribes by virtue of its article I authority. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *see Seminole Tribe*, 517 U.S. at 62 (states have been "divested of virtually all authority over Indian commerce and Indian tribes.") Primary federal jurisdiction through federal superintendence over the land by virtue of the application of the trust under § 465 and § 1151 jurisdiction,[32] coupled with Congress' exclusive legislative authority

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acquisition of state land for enclaves. In other words, the Enclave Clause reflects a respect for the autonomy of federal and state governments by equipping Congress with the 'sword' of legislative authority and supplying the states with the 'shield' of consent." *Virginia v. Reno*, 955 F. Supp. 571, 576-77 (E.D. Va. 1997) (emphasis added) (footnotes in original text omitted) (subsequent appeal mooted by congressional action).

[32] "Indian country" has been treated like other federal enclaves through 18 U.S.C. § 1153. *See United States v. John*, 437 U.S. 634, 651 (1978) (§ 1153 jurisdiction is "exclusive of state jurisdiction"); *United States v. Goodface*, 835 F.2d 1233, 1237-38 n.5 (8th Cir. 1987) ("[t]he terms within the exclusive jurisdiction of the United States" in § 1153 "refer to the law in force in federal enclaves, including Indian country"); *cf. Negonsott v. Samuels*, 507 U.S. 99, 101 (1993) (finding § 1152 (continued...)

over Indian matters and tribal sovereignty would collectively operate to exclude state law. That would leave the federal government with the power of exclusive jurisdiction over the Parcel.[33]

The District Court relied on dicta from *City of Roseville v. Norton*, 219 F. Supp.2d 130, 150 (D.C.C. 2002) to find that since the imposition of the trust would not be "a complete ouster of state jurisdiction" there would be no Enclave Clause violation. 290 F. Supp.2d at 188. In *City of Roseville*, however, the court properly determined that "Congress holds exclusive and plenary authority over Indian

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extends "enclave jurisdiction to Indian Country" but recognizing Kansas retained state jurisdiction by act of Congress).

[33] Since 1993, the Tribe has sought trust status to exclude the State's jurisdiction over the Parcel through the application of "Indian country" jurisdiction under 18 U.S.C. § 1151. Indeed, as the Secretary acknowledges, primary jurisdiction over trust land rests with the federal government and the Tribe, not with the State. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Where land is taken in trust, the federal government makes clear that "it is prepared to exert jurisdiction over the land." *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) (citations omitted). The Tribe pursues this trust for this very reason: to prohibit the application of State law.

The Secretary's own regulations mandate that "none of the laws . . . of any State . . . shall be applicable" to land that is held in trust for a tribe by the United States. 25 C.F.R. § 1.4(a). Moreover, the BIA's jurisdictional assessment (pursuant to 25 C.F.R. § 151.10(f)), which the Secretary affirmed, conceded that "if taken into trust, the 31-acre housing parcel would be subject to primary tribal and federal jurisdiction." Federal Defendants' Memorandum in Support of Motion for Summary Judgment at 8 (App. at Tab 24).

tribes" found in article I. *City of Roseville* 219 F. Supp.2d at 152 citing *Morton v. Mancari*, 417 U.S. at 551-52, but then overlooked the reach of that exclusive legislative authority. Congress' plenary authority to exclusively legislate in the area involving Indian tribes, coupled with the ability of the Secretary to assert federal primacy over the Parcel to the exclsuion of State law is the very reason why this action is unconstitutional without a state's consent. Even assuming some unknown and undefined quantum of state jurisdiction exists, that would not cure the constitutional infirmity of exlcusive federal jurisdiction.

One illustration is the ouster of state law through the application of the Indian Major Crimes Act. *Negonsott v. Samuels*, 507 U.S. 99 (1993), dealt with the application of the Indian Major Crimes Act, 18 U.S.C. §§ 1151 *et seq.*, on tribal land in Kansas. There the Court recognized that "federal jurisdiction over the offenses covered by the Indian Major Crimes Act is 'exclusive' of State jurisdiction." *Negonsott*, 507 U.S. at 102-03 (citing 18 U.S.C. § 1153 ("Indian country jurisdiction" applicable to trust lands). The Court found that this act "extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country" with the exception of offenses committed by one Indian against the person or property of another that is subject to the Tribe. *Negonsott*, 507 U.S. at 102.

In *Negonsott*, Congress had conferred jurisdiction to Kansas over criminal

offenses committed in "Indian country." *Id*. at 103-04. The Supreme Court held under that scenario Kansas retained "concurrent 'legislative' jurisdiction" over Indian lands to "define and prosecute similar offenders." *Id.* at 105. Thus, the federal government did not obtain exclusive legislative jurisdiction in light of the congressional act conferring such jurisdiction to Kansas. The Rhode Island Settlement Act presents a like scenario. Congress ensured that state law would not be preempted by federal law through 25 U.S.C. § 1708. The conversion of the Parcel to trust, however, would divest the State of its jurisdiction.

Moreover, when a state's sovereignty is implicated under the Eleventh Amendment (protecting a state's sovereign immunity), the question is not how much, but *whether* the action encroaches at all on a state's sovereignty. *Cf. Pennhurst State School and Hosp. v. Handerman*, 465 U.S. 89, 101-02 (1984) (suit against state barred whether or not it seeks damages or injunctive relief). Accordingly, consent is required here before the federal government decides to exert exclusive federal jurisdiction and eclipse any portion of Rhode Island's sovereignty. The Secretary's trust conversion of the Parcel is an unconstitutional violation of the Enclave Clause.

b. Article IV, § 3 prohibits the Secretary's Action

The Constitution preserves a state's territorial integrity through art. IV, § 3, which prohibits the "involuntary reduction . . . of a state's territory." *Printz*, 521

U.S. at 919. The Constitution commands that:

> no new State shall be formed or erected within the Jurisdiction of any other State; . . . 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.

> The Court has broadly construed a "state" under the Constitution as: a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not infrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

Texas v. White, 74 U.S. 700, 720 (1868).[34]

Therefore, where there is convergence of a people, a territory, and a government a "state" in the broadest sense is formed. The Constitution expressly prohibits the involuntary reduction or diminishment of a state's territory without its consent. In this way, the principles under which our federal government was formed maintain the respect, dignity, and integrity of the sovereign states' territorial jurisdiction.

> The status of Indian tribes has been described as:
> an anomalous one of complex character for despite their partial assimilation into American culture, the Tribes have retained 'a semi-independent position … not as states, not as nations, not possessed to the full attributes of sovereignty, but as a separate people, with the power of regulating their internal social relations, and thus far not brought under the laws of the union or of the state within whose limits

[34] *Texas v. White* was overruled on an unrelated issue in *Morgan v. United States*, 113 U.S. 476, 496 (1885). Thereafter, Texas was quoted approvingly on the meaning of "State" in *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

they reside.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-42 (1980).

While it is true that tribal territory is not a state in the narrow or strict sense of being one of "the 50 states," under the broader definition of a "state," discussed above, the Supreme Court has determined that where there is the combination of a people, a territory and a government that a "state" does in fact exist. The District Court dismissed the possibility of a sovereign "state" being created by reading this provision narrowly. 290 F. Supp.2d at 188-89. Article IV, § 3, however, prevents the creation of a territory within the jurisdiction of a state for a separate sovereign in an extra-constitutional manner.

The District Court overlooked the fact that a tribe operating on unrestricted federal trust land possesses "attributes of sovereignty over its members and their territory." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). The Secretary proposes to take the Parcel into trust for the Tribe and the federal government to exercise sovereign authority over the Parcel beyond the jurisdiction of Rhode Island. This action would create a territory for the exclusive use of another sovereign within the State's jurisdiction in violation of art. IV, § 3.

Accordingly, the creation of a new territory – consisting of the Parcel – without the State's consent is unconstitutional. U.S. CONST. art. IV § 3.

3. *Congress' Plenary Art. I Authority Does not Extend to*

Abrogating State Sovereignty

Finally, it is beyond the authority of Congress' article I Indian Commerce Clause power to abrogate a state's sovereignty. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). The issue is the constitutional authority of Congress to strip a state of its jurisdiction and thus its sovereignty. It is not just the supremacy of federal law, but the exercise of it consistent with a state's sovereignty. *Alden v. Maine*, 527 U.S. at 756 ("Congress has vast power but not all power."). "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation." *Id*. at 746. Congress "may not treat" the states that are sovereign entities "as mere prefectures or corporations." *Id.* at 756.

The District Court failed to recognize that Congress does not have the authority under its Indian Commerce Clause power to diminish a state's sovereignty. In the case of *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) the Supreme Court determined that Congress does not have the ability to impair the sovereignty of a state under its article I authority. The Secretary asserts § 465 as the authority to take land into trust and § 1151 as the jurisdiction. Congress cannot provide the Secretary with the authority to take the sovereign territorial jurisdiction of a state.

Accordingly, the proposed trust would result in the diminution of the State's sovereign jurisdiction and is beyond the reach of Congress' article I authority. Further, such an action without consent is a violation of the Enclave Clause and art. IV § 3, and is therefore unconstitutional.

D. Section 465 of the 1934 Act Violates the Nondelegation Doctrine

The nondelegation doctrine is an underpinning of separation of powers jurisprudence. *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." U.S. Const. art. I, § 1. The text permits no delegation of those powers. *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). Therefore, Congress "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1934). As such, when Congress confers decisionmaking authority upon agencies, Congress itself must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).

Further, in cases such as this one, where the Secretary's decision has fundamental implications regarding the State's ability to apply its laws to land

within its borders, the delegating statute requires an even higher degree of definiteness. *See United States v. Robel*, 389 U.S. 258, 275 (1967).[35] Such rigorous scrutiny of the power delegated to the Secretary is critical – at issue is the federal government's inability to wrest sovereignty and jurisdiction from the heart of a state. The only limitation in § 465 on the Secretary's trust-taking authority is that the trust acquisition must be "for the purpose of providing land for Indians." 25 U.S.C. § 465. Thus, Congress has laid down no "intelligible principle" to guide the Secretary.

In *South Dakota v. United States Dept. of Interior*, 69 F.3d 878, 882 (8th Cir. 1995), *vacated on other grounds*, 519 U.S. 919 (1996) the Eighth Circuit so held:

> 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, thereby removing these properties from state and local tax rolls. 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

[35] "[T]he area of permissible indefiniteness narrows . . . when the regulation . . potentially affects fundamental rights . . . because the numerous deficiencies connected with vague directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake." *Robel*, 389 U.S. at 275 (Brennan, J. concurring). Moreover, "the degree of agency discretion that is acceptable varies according to the scope of the power congressional conferred." *Whitman* 531 U.S. at 476. Since the power exercised under the 1934 Act is one that threatens fundamental state soveregnty, the degree of agency discretion is exceedingly narrow.

Indian tribes or individual Indians.

Id. at 882.

Because of this standardless delegation, the Eighth Circuit found the "[t]he result [to be] an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with the separation of powers principles." *Id.* at 885.[36]

The Eleventh Circuit also examined the unbridled parameters of § 465. *State of Florida, Dept. of Bus. Reg. v. United States Dep't of Interior*, 768 F.2d. 1248, 1256 (11th Cir. 1985). The Court concluded that "[t]he statute . . . does not delineate the circumstances under which exercise of this discretion is appropriate" and determined that "[i]f there are no judicially manageable standards available for judging how and when an agency should exercise its discretion, then it is

[36] In the aftermath of *South Dakota*, the BIA amended its regulations regarding land acquisitions by adding a procedure to allow judicial review of decisions to take land into trust. See 61 Fed. Reg. 18,082 (April 24, 1996) (codified at 25 C.F.R. § 151.12 (b)). The BIA thus relinquished its position that the decision to take land in trust was "committed to agency discretion by law." 61 Fed. Reg. at 18,082-83. It was based on this change that the Eighth Circuit's opinion was vacated and remanded by the United States Supreme Court. *See Department of Interior v. South Dakota*, 519 U.S. 919, 920-22 (1996). The Supreme Court did not reverse the Eight Circuit on its finding of a nondelegation violation. *South Dakota* is winding its way back through the courts on non-delegation grounds, among others. *South Dakota v. Department of the Interior*, Civ. 00-3026 (C.D.S.D.).

impossible to determine even whether the agency abused its discretion."[37] The Court found that none existed. The precise holding in the case, that trust taking was limited to agency discretion and not reviewable, was superceded by the amended BIA regulations referenced above.[38]

The District Court relied solely upon the Tenth Circuit's decision in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), which determined that "the statute placed itself placed ample limits on the secretary's exercise of discretion." The District Court therefore found no constitutional infirmity. *Id*. at 1173; 290 F. Supp.2d at 187. The District Court's decision is bereft of further analysis – it simply relied on the Tenth Circuit. The Tenth Circuit's decision itself, however, contains only scant analysis.

In sum, State Appellants urge this Court to adopt the comprehensive analysis of the Eighth Circuit in *South Dakota* and reject the cursory analysis of *Roberts* as adopted by the District Court. Since there is no intelligible principle and the action of taking and into trust is no longer committed to agency discretion, the action is a unconstitutional delegation of constitutional authority.[39]

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[37] The plaintiffs in Florida never challenged the constitutionality of the act. *See Florida*, 768 F.2d at 1252.

[38] Notably, the Congress that enacted § 465 handed down two other unconstrained delegations. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating section of the National Industrial Recovery Act); *Panama Refining*, 293 U.S. 388 (1935) (same).

[39] The Secretary cannot take any solace in her own regulations as saving an

(continued...)

E. Taking the Parcel into Trust is an Abuse of Discretion Under the APA

The Administrative Procedures Act (the "APA") requires courts to hold agency actions unlawful if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency acts arbitrarily and capriciously if it relies on factors that Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view nor the product of agency's expertise. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 46-57 (1983). Each of these defects occurred here.

A touchstone for trust taking under federal law is a reasonable basis for taking the land into trust. The purported reason in the record for taking the Parcel

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[39](...continued)
otherwise standardless congressional delegation. *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. at 472-73 (it is "inherently contradictory" to allow an agency to cure an inappropriate delegation with agency regulations). As an aside, even the regulations provide no real standard. They do not assign weight to any factor, prohibit the acquisition of lands in particular areas, or limit the size of any acquisitions. *Florida*, 768 F.2d at 1252-53 (regulations are not limits on and do not constrain the Secretary's authority to acquire land in trust for Indians); see 25 C.F.R. § 151.10 ("the purposes for which the land will be used").

Even these factors become illusory when juxtaposed against 25 C.F.R. § 1.2 ("Notwithstanding any limitations contained in the regulations in this chapter, the Secretary retains the power to waive or make exceptions to his regulations . . . [when] in the best interest of Indians.").

into trust is to provide the Tribe with land for housing. The taking of the Land into trust, however, has no rational connection to the goal of providing additional tribal housing. That is because the Parcel is already owned by the Tribe and the housing has been approved by State and local jurisdictions.[40]

Moreover, taking of the Parcel in trust does nothing to alter the availability of federally-funded housing (or any other federal benefits, for that matter) to the Parcel. The Tribe's ownership of the Parcel in fee simple makes it eligible for such benefits. The Federal Appellees fully acknowledged this fact below:

> [T]he Narragansett Tribe currently contracts with the BIA and IHS to provide federal service programs. Hence, the Bureau determined that acquisition of the housing parcel in trust would have minimal impact on the Bureau's ability to fulfill its responsibilities since the Tribe already provides basic federal services to its members.

Federal Defendants' Memorandum in Support of Motion for Summary Judgment at 8 (App. at Tab 24).

Rather, as discussed above, the purpose and effect of the taking of the Parcel in trust is the unprecedented defeasance of the laws and jurisdiction of the State

[40] The Tribe is free to complete the development so long as it does not interfere with drainage easements owned by the Town. These easements were protected by the District Court and their protection affirmed by this Court in the *Narragansett Electric* case cited several times above. If the Tribe wishes to eliminate or swap an easement, the Town would be willing to consider that request so long as its land use ordinances (applicable to all residents) continued to apply on the Parcel. Unfortunately, the Tribe has refused to allow voluntarily any continued Town land use regulation. Indeed, it refuses to agree to limit the use of the Parcel to housing or even rule out a potential IGRA casino on the Parcel. In short, it demands an unrestricted trust to avoid application of any State laws and Town ordinances.

and the Town.[41] Trust also furthers the potential for a federalized casino in the Parcel, a factor never considered by the BIA. Indeed, once the land goes into trust, purportedly for housing, the Federal Appellees argued below that the extent of that housing and indeed the very use of the Parcel can change in the face of contrary State laws and local land use restrictions applicable to all (*e.g.* density).

The factors that the BIA must consider in a fee-to-trust transfer are set out at 25 C.F.R. §§ 151.10 ("On-reservation acquisition") and 151.11 ("Off-reservation acquisition"). The BIA asserts that it applied the factors set out at 25 C.F.R. § 151.10, determining that the Parcel was an "On-reservation" acquisition. AR, Vol. II, Tabs H (App. at Tab 8), O (App. at Tab 16).[42] A review of the record, however,

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[41] While federal trust eliminates taxes on the property the Town would have agreed to special tax treatment in a local cooperation agreement had it not been confronted with the Tribe's quest to divest its ordinances completely from the Parcel.

[42] Whether an acquisition is "on-" or "off-" reservation hinges on whether the Parcel is "contiguous to the tribe's reservation." 25 C.F.R. §§ 151.10, 151.11. It also hinges on whether there is a "reservation" at all. There is no congressional authority supporting the notion that the Settlement Lands constitute a "reservation." In fact, Congress refused to call the 1,800 acres anything but "settlement lands" in the 1978 Act. Since the tribe has no "reservation," *neither* trust section applies.

The apparent basis of the BIA determination in this instance is the Tribe's unrelenting mantra that the Parcel is "adjacent" and "contiguous" to Tract No. 2 of the Settlement Lands. AR, Vol. I, Tabs D (App. at Tab 9), H (App. at Tab 10), 14; Vol. II, Tab D (App. at Tab 5) (July 17, 1997 memorandum and subtabs 5). Appellants challenge the finding by the BIA and the District Court that the Parcel is adjacent to Settlement Lands. 290 F. Supp.2d at 170. *See, e.g.*, AR, Vol. I, X (App. at Tab 3). While a determination that lands are "contiguous" is a necessary

(continued...)

shows that it did not.

1. The BIA Abused Its Discretion by Relying Exclusively on the Tribe

The BIA's arbitrary and capricious conduct is best exemplified by the primary document upon which it relied in taking the Parcel into trust: the Decision. AR, Vol. II, Tab H (App. at Tab 8).

While the Decision purports to evaluate the Tribe's 1997 application, *see* AR, Vol. II, Tab D (App. at Tab 5), it is a word-for-word regurgitation of correspondence drafted by the Tribe's legal counsel in 1993. *Compare* AR, Vol. I, Tab D (App. at Tab 9) *with* AR, Vol. II, Tab H (App. at Tab 8).[43] The obvious similarity between the two documents allows only for the conclusion that the BIA entirely failed to consider independently important aspects of the problem which occurred between 1993 and 1997, including, but not limited to (a) litigation before the District Court and the First Circuit that examined both jurisdictional and environmental issues, *Narragansett Elec.*, 89 F.3d at 912;[44] and (b) comments

(...continued)
factor to trigger the Indian Gaming Regulatory Act, *see infra*, the determination is relatively insignificant to the application of either section in this case, as the sections differ only slightly. *Compare* 25 C.F.R. § 151.10 *with* § 151.11.

[43] The textual swipe begins at the second line of page two of the legal counsel's correspondence. *See* AR, Vol. I, Tab D, at 2 (App. at Tab 9).

[44] In fact, with regard to jurisdictional issues the undated staff memorandum (mirroring the 1993 correspondence), states: "The Tribe is presently engaged in litigation with the State over the extent to which State civil/regulatory jurisdiction applies to the Tribe's current trust lands." *Accord* AR, Vol. I, Tab D (App. at Tab
(continued...)

submitted to the agency by Plaintiffs. AR, Vol. I, Tabs X, 7, 15 (App. at Tab 3).

2. The BIA Misapplied the § 151.10 Factors

Assuming *arguendo*, that the Secretary can convert into trust lands already owned by the Tribe, and can apply rules that presume an existing "reservation"[45] to congressionally-determined "settlement lands," she misapplied the criteria by which she may do so.

The Secretary failed to consider "the need . . . of the tribe for additional land" as required by §151.10(b). In her justification, the Secretary relied on the Tribe's asserted need for housing. Again, however, the Tribe's need to provide housing is unrelated to the Parcel's trust status. The Secretary glosses over this by saying the Tribe has justified the need to take the Parcel into trust because it needs housing. The Tribe did not and could not demonstrate that *trust* status is necessary

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(...continued)
9) and Vol. II, H (App. at Tab 8) (emphasis added). The reference to "this litigation" predates either of the *Narragansett Electric* cases detailed above, and instead refers to *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) (decided March 24, 1994). For jurisdictional purposes, this was an era when the Tribe held the erroneous position was that the Settlement Act provisions did not apply to it post-federal recognition. *See id*. at 694; *see also* AR, Vol. I, Tab H (which is also Vol. II, Tab D, subtabs 5) (App. at Tab 5). That position was thoroughly rejected by this Court. *See Narragansett Indian Tribe*, 19 F.3d at 694-95.

[45] Section 465 states that the Secretary may acquire land "for the purpose of providing land for Indians." Where, as here, the land is already owned by Indians, the Secretary's "acquisition" does not *provide* land for Indians. The Tribe has already provided land for itself.

for the provision of housing, and the Secretary simply did not consider whether it was or not. As discussed above, the conversion to trust is not required for housing or qualification for any other federal program.

Likewise, § 151.11(b) requires the Secretary to scrutinize the Tribe's "justification of anticipated benefits" from the conversion to trust. The Secretary did not receive any justification for the conversion from the Tribe. The Secretary also failed to consider the real impact of the fee-to-trust conversion on local tax rolls. The Federal Appellees glibly stated below that the BIA "determined that the removal of the undeveloped parcel would not have significant impact on the tax rolls." Federal Defendants' Memorandum in Support of Motion for Summary Judgment at 7 (App. at Tab 24). The impact on the Town cannot be measured by looking at the Parcel in its undeveloped state. Prior to its acquisition by the Tribe, the Parcel was approved for construction of at least 11 homes, each of which would have been paying property taxes to the Town.

If the Parcel is used for Indian housing *and* taken into trust, the Town would lose tax revenues from the eleven homes that would have been located on the Parcel, while at the same time providing services to the housing units proposed for the Parcel (*e.g.*, schools, fire protection, road maintenance, drainage easements). Considering the impact of the transfer of an undeveloped parcel simply does not properly assess the economic impact to the Town or the State of converting this

land to trust. The Secretary's failure to do so is a clear abuse of discretion, especially when coupled with her *ex parte* waiver of a cooperation agreement with the Town (discussed below), which would have addressed this issue and others.

Next, the Secretary completely ignored the complex jurisdictional issues arising from taking the Parcel into trust. The Secretary asserts that any jurisdictional problems arising from the conversion of the Parcel to trust status have been definitively put to bed by previous litigation between the Tribe and the State. Federal Defendants' Memorandum in Support of Motion for Summary Judgment at 8 (App. at Tab 24). Of course, this appeal is ample proof that that conclusion was wishful thinking.

The Secretary afforded too much weight to the proffered purpose for which the Parcel is to be used, because even according to the Federal Appellees, to afford this factor any consideration whatsoever is to afford it too much.[46] That is because that purpose can change at any time to any other purpose, including an attempt to try to turn the Parcel into an IGRA casino.

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[46] Repeatedly in conferences below, the Federal Appellees represented to the State Appellants and to the District Court that once the Parcel is in trust, the housing purpose does not matter; shortly after the trust taking the Tribe could abandon the housing project and use the land for a different purpose. In essence, the purported purpose is meaningless, and therefore so is any analysis pursuant to § 151.10(c). Further, the Tribe's solicitation of punch-list supporting correspondence includes the HUD letter, AR, Vol. I, Tab B (App. at Tab 12), which was accepted without qualification by the Secretary. It demonstrates the Secretary's lack of independent review of whether the Parcel could or could not be developed to meet the housing proposed without trust conversion.

3. *The NAHASDA Cooperation Agreement "Waiver" Violated Due Process*

The Federal Appellees assert that the basis for this trust taking relies on the Secretary's authority to take land into trust for Indians for housing. Among the prerequisites for the funding for such development, Congress required HUD to obtain a local cooperation agreement (covering taxes, jurisdiction, etc.) under the Native American Housing and Self Determination Act ("NAHASDA") before it could release funds for any housing development. 25 U.S.C. § 4111(c). Without the funds, there would be no housing project and therefore no purpose upon which the BIA could rely upon to take the Parcel into trust. There has been no cooperative agreement entered into between the Town and the Tribe. The District Court points out that Congress amended the applicable law to allow HUD to grant a waiver (Pub. L. 106-569 Dec. 27, 2000). 290 F. Supp.2d at 178. The Court then states that "it appears that the tribe has obtained such a waiver." *Id.* There is, however, nothing whatsoever in the record to support this conclusion. The Town never received notice from HUD or BIA that a waiver had been granted.

More importantly, if a waiver was somehow granted by HUD, it was done *ex parte* with no notice to the Town or any opportunity to be heard in opposition to such a waiver (which is granted only if a Town is not acting in good faith). If the BIA accepted this waiver, it inherited the legal error and acted in an arbitrary and capricious manner. Since the waiver process was legally defective and the BIA

can only accept the Parcel into trust for a viable housing project, the Decision cannot stand.[47]

4. The BIA Failed to Consider Environmental Impacts

The Secretary and the BIA are under an affirmative obligation to consider the environmental impact of agency decisions, including those impacts occurring when taking land into trust for Indians. The National Environmental Protection Act ("NEPA") and its supporting regulations promulgated by the Council on Environmental Quality ("CEQ") set this requirement. See 42 U.S.C. §§ 4321-4370e; 40 C.F.R. part 1500, *et seq.* (agency is required to prepare a detailed statement describing "the environmental impact of the proposed action . . . any environmental effects which cannot be avoided, [and] . . . alternatives to the proposed action."). The Secretary failed to take a hard look at the consequences or consider alternatives to satisfy these requirements precedent to her Decision – this despite the fact that this Court had already affirmed the conclusion that the Parcel

[47] By happenstance, many months after the alleged waiver was granted, the Tribe, at counsel's request forwarded what appeared to be a document granting the waiver. That document contains misrepresentations regarding the Town's position. That is because the Town was neither notified nor provided an opportunity to be heard while the waiver request was under consideration. To this day, the Town has still not received from HUD or the BIA the alleged document granting the waiver or the reasons therefore.

was in an environmentally-sensitive area.[48]

The Secretary must prepare an Environmental Impact Statement ("EIS") for any action which could significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1508.27. In lieu of meeting the BIA's independent obligation to ascertain the environmental impacts, the Secretary merely parroted the findings and supporting representations made by the Tribe. AR, Vol. II, Tab D, Subtabs 9 (purporting to be an Environmental Assessment ("EA")) (App. at Tab 5); AR, Vol. II, Tab D, Subtabs 10 (purporting to be the BIA acceptance of EA) (App. at Tab 5). Tellingly, in reviewing the Tribe's EA, the BIA's NEPA Compliance Officer candidly observed that it was "not much of an EA, but what the heck." AR, Vol. I, Tab K (App. at Tab 22). Despite a proposed 50-unit development, there was no due, credible, scientific consideration of the impacts of a housing project of this magnitude by either the Tribe or the BIA other

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[48] This Court affirmed a finding that:

> The evidence demonstrates that the housing site is in close proximity to Ninigret Pond, a fragile salt water estuary that is a prime spawning ground for several species of commercially important fish. Ninigret Pond is already ecologically stressed principally by the infiltration of nitrates in the groundwater which lowers the oxygen content of the pond thereby adversely effecting both plants and fish life. There is at least, a real possibility that nitrates added to the groundwater by the [housing projects] ISDS [Individual Sewage Disposal Systems] systems will flow into the pond and worsen an already serious problem.

89 F. 3d 908, 912 (1st Cir. 1996) (quoting 878 F. Supp. 349 at 355 (D.R.I. 1995)).

than proffered by the Tribe in AR, Vol. II, Tab D, Subtabs 9, 10 and 11 (App. at Tab 5). No EIS was prepared. AR, Vol. II, Tab D (App. at Tab 5).

The Town zoning ordinance set the zoning density at two acres per lot. Prior to acquisition by the Tribe, the Parcel was developed as an approved subdivision of 11 lots with the prerequisite environmental Assent from the Coastal Resources Management Council ("CRMC").[49] The BIA sought no such Assent for a proposed use that was almost five times the density of the CRMC-approved limit. AR, Vol. I, Tab D, at 5 (App. at Tab 9). Therefore, the defects which would have been immediately apparent in any objective and independent agency review were not disclosed. The Tribe construes the HUD regulations that HUD, ". . . mandates no more than one (1) acre of land per housing unit" and follows directly with its conundrum: "The contract between NIWHA[50] and HUD was to develop fifty (50) units on the thirty-one (31) acres. However, local zoning permits only one (1) unit per two (2) acres of land." AR, Vol. II, Tab D, at 9-12 (App. at Tab 5).

The Tribe has been aware of this defect. As the result of litigation, it was ordered to comply with CRMC reviews as a prerequisite to occupying the housing site. *Narragansett Electric Co.,* 89 F.3d at 922. The Tribe then insulated the

[49] The Department of Commerce National Oceanic and Atmospheric Administration (NOAA), administers the CZMA, and through its authority has delegated the regulation of the coastal zone to the CRMC. The review mandated by the CZMA is set forth *infra*.

[50] Narragansett Indian Wetuomuck Housing Authority.

Secretary from having to acknowledge the impact of the development by providing a letter from the CRMC which represented that the Tribe "would cease all activity on site" and therefore be in compliance. AR, Vol. II, Tab D, Subtabs 11 (App. at Tab 5). The Secretary abused her discretion by not independently seeking a determination of the CRMC with respect to the proposed development. Rather, she merely accepted the letter proffered by the Tribe, thus circumventing the federal consistency review requirement.

This was a standardless review process. No housing of the scope proposed was ever reviewed.[51] At no time were appellees consulted, nor were hearings scheduled with the Town regarding the potential impacts of the housing development. The lack of review and consultation demonstrates the standardless approach to the process of this trust application.[52] Moreover, the lack of an EIS in this environmentally-fragile area alone was an abuse of discretion.

5. The BIA Failed to Consider Noncompliance with the CZMA and IGRA

The CZMA requires that federal activities likely to affect any land or water

[51] AR, Vol. II, Tab D, at 5-7 (App. at Tab 5).

[52] For example, Town drainage easements are located on the Parcel, but no acknowledgement of the jurisdiction of the Town over these easements is noted in the Decision or in the proposed deed, nor is there mention of the BIA's obligation to "discharge the additional responsibilities resulting from the acquisition of the land into trust status." 25 C.F.R. § 151.10 (e), (f). There is no doubt that the Federal Appellees and the Tribe will take the position that these easements are extinguished if the land is taken into Trust – to the great potential environmental detriment of a vast surrounding area.

use or natural resource in the coastal zone be consistent with the Rhode Island Coastal Zone Management Program ("RICRMP"). The CRMC administers this program which applies to federal agencies. The Parcel is located within the Special Area Management Plan ("SAMP") area identified by RICRMP and therefore, the mandates of Federal Consistency Review procedures apply to the BIA. See 15 C.F.R. Part 930, subpart C.

The BIA took no direct action of its own to meet this burden and made no application to the CRMC seeking Federal Consistency Review to establish independently that the proposed taking for housing was warranted. Again, the Secretary relied solely on the Tribe's review, and thereby, and in error, adopted the CRMC document obtained by the Tribe in lieu of meeting its statutorily mandated obligation. AR, Vol. II, Tab D, Subtabs 11 (App. at Tab 5). The unfortunate result in that event is foretold in the attempt to reconcile the objective for the 50-unit housing development suggested in the Tribe's Application Memorandum with its inconsistent acknowledgment that the HUD and CRMC regulations are incompatible. AR, Vol. II, Tab D (App. at Tab 5).

Likewise, the BIA failed to consider the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710-2721 ("IGRA") in its decision. Throughout the trust process to the present, the Tribe continues its attempt to develop a casino in Rhode Island. If taken in trust, the Parcel would be, for the first time in its constitutional history,

land over which the State involuntarily lacked sovereignty. This exclusive tribal jurisdiction, effectively outside of Rhode Island, would support an argument by the Tribe to attempt to develop gambling facilities on the Parcel under IGRA. The District Court correctly noted that the Tribe has *not* ruled out use of the Parcel for a potential casino under IGRA and that the Tribe refused to agree to any restriction prohibiting such use as a condition of trust. 290 F. Supp.2d at 178. Contrary to the District Court's conclusion, the failure of the BIA to give serious consideration of this issue was a clear abuse of discretion. In *Village of Ruidoso, New Mexico v. Albuquerque Area Dir. Bureau of Indian Affairs*, 1998 WL 233740 (1998) an administrative law judge reversed the Secretary's decision not to consider the impact of a potential casino. There, the tribe orally *denied* any intention of ever attempting using its parcel for a casino, but other factors, including its location suggested otherwise. Here, the Tribe refuses to represent or covenant that it will not attempt to use the Parcel for a casino if converted to trust. Based on that fact and the fact that the Tribe has sought and continues to seek a casino, the Decision here, as in *Ruidoso*, must be reversed and "further BIA inquiry into whether the parcel would be used for gaming purposes" required. 290 F. Supp.2d at 179 (citing *Ruidoso*).

VII. CONCLUSION

For the reasons set forth herein, the decision and judgment of the District Court must be reversed and the case remanded for entry of judgment for the State Appellants.

DONALD L. CARCIERI
in his Capacity as Governor of
the STATE OF RHODE ISLAND
PROVIDENCE PLANTATIONS

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Counsel for the State Appellants hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 22,000 words, which is fewer than the 28,000 allowed by this Court's Order entered January 22, 2004. This brief complies with the typeface requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced font using Wordperfect for Windows in Classic Garamond BT in 14 point type.

CERTIFICATE OF SERVICE

I hereby certify that caused to be forwarded a copy of the within brief via regular mail, postage prepaid, to Elizabeth Ann Peterson Appellate Section Environment & Natural Resources Division, Room 8930 Department of Justice, PO Box 23795 L'Enfant Station, Washington, D.C. 20026; and to Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI 02903 on the 6th day of February 2004.