EN BANC ORAL ARGUMENT SCHEDULED FOR JANUARY 9, 2007

No. 03-2647

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DONALD L. CARCIERI, in his capacity
as Governor of the State of Rhode Island, et al.,
Plaintiffs-Appellants,

v.

DIRK KEMPTHORNE, in his
capacity as Secretary of the Department of the Interior, et al.,
Defendants-Appellees.

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

SUPPLEMENTAL EN BANC BRIEF FOR AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, INDIVIDUAL INDIAN TRIBES, AND TRIBAL ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLEES

(full listing of Amici Curiae inside)

Riyaz A. Kanji
Kanji & Katzen, PLLC
201 South Main Street
Suite 1000
Ann Arbor, MI 48104
(734) 769-5400

Ian Heath Gershengorn
Counsel of Record
Sam Hirsch
Jenner & Block LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Richard Guest
Native American Rights Fund
1712 N Street, N.W.
Washington, DC 20036
(202) 785-4166

John Dossett
National Congress Of
American Indians
1301 Connecticut Ave., N.W.
Washington, DC 20036
(202) 466-7767

December 26, 2006

Counsel for Amici

LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS

Absentee Shawnee Tribe
Akiak Native Community
Cahto Tribe of the Laytonville Rancheria
Cheyenne River Sioux Tribe
Coeur d'Alene Tribe
Confederated Salish and Kootenai Tribes of the Flathead Nation
Confederated Tribes of the Warm Springs Reservation of Oregon
Eastern Pequot Tribal Nation
Eastern Shawnee Tribe of Oklahoma
Ely Shoshone Tribe
Fallon Paiute-Shoshone Tribe
Ft. McDermitt Paiute-Shoshone Tribe
Grand Traverse Band of Ottawa and Chippewa Indians
Inupiat Community of Arctic Slope (IRA)
Kenaitze Indian Tribe, IRA
Kickapoo Tribe in Kansas
Lac Courte Oreilles Band of Lake Superior Chippewa
Lovelock Paiute Tribe
Lummi Nation
Moapa Paiute Band of the Moapa Indian Reservation
Modoc Tribe of Oklahoma
Native Village of Venetie IRA Tribal Government
Nez Perce Tribe
Oneida Tribe of Indians of Wisconsin
Prairie Band of Potawatami Nation
Pueblo of Laguna
Pueblo of Santa Ana
Pueblo of Taos
Seminole Tribe of Florida
Shoshone-Paiute Tribes of the Duck Valley Reservation
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
St. Regis Mohawk Tribe
Suquamish Tribe

LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS
(continued)

Tanana Chiefs Conference
Te-Moak Tribe of Western Shoshone Indians
Tuolumne Band of Me-Wuk Indians
United South and Eastern Tribes, Inc.*
Washoe Tribe of Nevada and California
Yomba Shoshone Tribe
Oglala Sioux Tribe

---

* The members of USET are as follows: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmac Indians; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Miccosukee Tribe of Florida; Mississippi Band of Choctaw Indians; Mohegan Tribe of Connecticut; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe-Indian Township; Passamaquoddy Tribe-Pleasant Point; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; St. Regis Band of Mohawk Indians; Tunica-Biloxi Indians of Louisiana; Wampanoag Tribe of Gay Head (Aquinnah).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amici state as follows: Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Amicus United South and Eastern Tribes, Inc. ("USET") is a nonprofit inter-tribal organization founded in 1968. Tanana Chiefs Conference ("TCC") is a nonprofit intertribal organization of Interior Alaska tribes. NCAI, USET, and TCC have no parent corporations, and no publicly held corporation owns 10% or more of stock in NCAI, USET, or TCC.

The remaining amici are tribal governments that are exempt from Fed. R. App. P. 26.1(a).

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 1

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Bryan v. Itasca County, 426 U.S. 373 (1976) 4

Carcieri v. Norton, 290 F.Supp.2d 167 (D.R.I. 2003) 9

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 4

City of Sault Ste. Marie v. Andrus, 458 F.Supp. 465 (D.D.C. 1980) 11

Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688 (9th Cir. 1997) 3

Grand Traverse Band of Ottawa and Chippewa Indians v. Office of The U.S. Attorney For The Western District Of Michigan, 369 F.3d 960 (6th Cir. 2004) 11, 12, 13

Grand Traverse Band of Ottawa and Chippewa Indians v. Office of The U.S. Attorney For The Western District Of Michigan, 920 F. Supp. 2d (W.D. Mich. 2002) 12, 13

Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002) 7

Kahawaiolaa v. Norton, 386 F.3d 1271 (June 13, 2005) 6

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) (en banc) 1

Rhode Island v. Narragansett Indian Tribe, 19 F.3d 694 (1st Cir. 1994) 9

Schisler v. Sullivan, 3 F.3d 563, 568 (2d Cir. 1993) 7

Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005), cert. denied, 127 S. Ct. 38 (2006) 3

South Dakota v. U.S. Department of Interior, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006) 3

United States v. John, 437 U.S. 634 (1978) 6

United States v. State Tax Commission, 505 F.2d 633 (5th Cir. 1974) 6

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) . . 15

Wisconsin v. Stockbridge-Munsee Community, 366 F. Supp. 2d 698 (E.D. Wisc. 2004) 9, 10

STATE CASES

People ex rel. Martin v. Hylan, 210 N.Y.S. 30 (App. Ct. 1925) 5

FEDERAL STATUTES AND REGULATIONS

67 Fed. Reg. 51867 . . . . . 11, 12

71 Fed. Reg. 5067 11

25 C.F.R. § 5.1(a) 4

25 C.F.R. § 81.1 4

25 C.F.R. § 83.7(g) 13

25 C.F.R. § 83.12 9

25 C.F.R. Part 151 12

25 C.F.R. § 151.2(b) 2, 4

25 C.F.R. § 151.2(c)(1) 2, 4

25 U.S.C. § 461 . . . . . 5, 6

25 U.S.C. § 465 . . . . . 1, 3

25 U.S.C. § 476(f) 7, 8

25 C.F.R. § 476(g) 7

25 U.S.C. § 478 5

25 U.S.C. § 479 . . . . . 3, 5, 7

25 U.S.C. § 2202 15

25 U.S.C. § 2201 15

25 U.S.C. § 2719 15

140 Cong. Rec. S6144, S6147 . . . . . 7, 8

Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a et seq 8

Indian Land Consolidation Act ("ILCA"), Pub.L. No. 97-459, Title II, 96 Stat. 2517 . . . . . 2, 9

OTHER STATUTES

Ill. Rev. Stat. ch. 38, § 108-3 5

MISCELLANEOUS

Cohen, Handbook of Federal Indian Law (3d ed. 2005) 10

Unif. Child Custody Jurisdiction Act § 14(a)(1), 9 U.L.A. 580 5

INTRODUCTION AND SUMMARY OF ARGUMENT

The State here challenges the Secretary's authority to take land in trust for the Narragansetts, and in so doing mounts a frontal assault on one of the most important provisions of Indian law that Congress has ever enacted. That provision, 25 U.S.C. § 465 ("Section 465"), provides the Secretary of the Interior authority to take land in trust for Tribes, reversing decades of the disastrous allotment policy and allowing the federal government to restore lands to Tribes and begin to repair the damage done by centuries of forcible displacement of Indians from their land. See NCAI Merits Br. 2-5 (providing background for enactment of Section 465).[1] The restoration of tribal land is a centerpiece of the federal government's efforts to ensure Tribes a measure of the economic and political independence. *Id.* at 5.

The State's requested relief with respect to Section 465 is thus not "idiosyncratic," "narrow," or based upon "the unique relationship between the Tribe and the State." *Cf. Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 20, 21, 22, 26 n.5 (1st Cir. 2006) (en banc) (construing Rhode Island Settlement Act). It is instead a broad attack on a core instrument of national Indian policy that (if successful) would have tremendously destabilizing consequences and would radically alter the federal government's power to aid Tribes.

---

[1] Amici incorporate by reference their prior briefs. References to the NCAI Amcius Brief submitted on April 20, 2004 are cited as "NCAI Merits Br. __"; references to the NCAI amicus brief submitted on June 15, 2005 in opposition to the State's initial petition for rehearing are cited as "NCAI Reh'g Opp. __."

The centerpiece of the State's argument is that the Secretary cannot take land in trust for the Narragansetts because the Tribe was not "recognized" and "under federal jurisdiction" in 1934. But the State's argument is directly contrary to duly promulgated regulations of the Secretary of Interior that make clear that the trust authority – and a host of other Indian-related powers – can be exercised on behalf of any Tribe that is federally recognized *today*. 25 C.F.R. § 151.2(b), (c)(1). Those regulations receive full deference under *Chevron*, and they reflect a reasonable construction both of Section 465 and other provisions of federal Indian law that prohibit distinctions based on the time and manner of recognition.

The State seeks to bolster its arguments by contending that the Secretary has rarely (if ever) exercised trust acquisition authority for Tribes that were not recognized in 1934. That contention is (as we will show) demonstrably wrong and reflects a distorted view of history. In any event, the State's contention is irrelevant: Even if the Narragansetts were the first post-1934 Tribe to receive land under Section 465 – and they are not – the acquisition of trust land for the Narragansetts is indisputably consistent with the Secretary's formal regulations, and thus this Court must affirm the Secretary here.

Finally, adopting the State's unprecedented reading of Section 465 is all the more inappropriate here, because the trust acquisition is independently sustainable under the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96

Stat. 2517 (1983). ILCA permits the Secretary to take additional land into trust for any Tribe that has land in trust already – as the Narragansetts do here.

In short, no court has *ever* struck down a trust application on the grounds raised here by the State, and this Court should not be the first.

ARGUMENT

Section 465 contains a broad authorization for the Secretary of the Interior to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. Under the statutory program, title is taken in the name of the United States "in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* No one disputes that the Narragansetts are today a federally recognized Indian tribe. The State contends nevertheless that 25 U.S.C. § 479 – which refers to "any recognized Indian tribe now under Federal jurisdiction" – limits the Secretary's trust authority to those Indians who are members of Tribe that was "recognized" and "under Federal jurisdiction" in 1934 when the Indian Reorganization Act ("IRA") was passed.[2]

[2] Amici will not repeat the arguments (NCAI Merits Br. 24-30) refuting the State's contention that Section 465 is an unconstitutional delegation of legislative power. *See* State Reh'g Pet'n 25. The courts of appeals have rejected that contention, and the Supreme Court has repeatedly denied review. *See, e.g.*, *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006); *South Dakota v. U.S. Dep't. of Interior*, 423 F.3d 790, 796-800 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006); *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 698 (9th Cir. 1997).

That argument fails at every level. The Secretary of the Interior has promulgated regulations that dictate the outcome on this issue. Those regulations unambiguously extend the benefits of the IRA to *all* federally recognized Tribes. The regulations implementing § 465, for example, define "tribe" broadly to include all Tribes currently recognized by the federal government, *see* 25 C.F.R. § 151.2(b), and they define "individual Indian" to include "[a]ny person who is an enrolled member of a tribe." *Id.* § 151.2(c)(1). Nor are the Secretary's land-into-trust regulations unique. The regulations implementing the IRA's other provisions adopt the same basic definition. *See, e.g.*, 25 C.F.R. § 5.1(a) (extending preferences to "[m]embers of any recognized Indian tribe now under Federal Jurisdiction"); 25 C.F.R. § 81.1 (IRA eligibility); NCAI Reh'g Opp. 12 (listing other regulations).

The Secretary's implementation of the Act expressed in formal regulations merits substantial deference from this Court under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), especially because "doubtful expressions" must be construed in favor of the Tribes, *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Indeed, the Secretary's trust-acquisition regulations in Part 151 enjoy special force because they have been acknowledged and implicitly approved by Congress. *See* NCAI Merits Br. 22.

To prevail, then, the State must show that the word "now" in Section 479 refers unambiguously to "1934" and not to "today." The State cannot meet that

burden. Courts and legislatures have read the word "now" to refer to the current time rather than to the time the statute was enacted in a variety of contexts, including (for example) in Uniform Laws. *See, e.g.*, Comment to Unif. Child Custody Jurisdiction Act § 14(a)(1), 9 U.L.A. 580 (1999) (explaining that the term "now" in the phrase "does not now have jurisdiction" means "at the time of the petition," not when the legislature enacted the statute); *see also People ex rel. Martin v. Hylan*, 210 N.Y.S. 30, 31 (App. Ct. 1925) (term "now" in pay-equalization statute does *not* refer to time of enactment); Ill. Rev. Stat. ch. 38, § 108-3 (allowing search warrant to search for "[a]ny person who has been kidnapped in violation of the laws of this State, or who has been kidnapped in another jurisdiction and is *now* concealed within this State") (emphasis added); NCAI Merits Br. 10. The word "now" is not the magic bullet the State claims.

Other provisions of the IRA further belie the State's contention that Congress' "unambiguously expressed intent" was that the word "now" means "on June 18, 1934," the date when the IRA was enacted. State Reh'g Pet. at 14 (citation omitted). When Congress invoked the IRA's date of enactment as a limiting principle in other IRA provisions, it did so expressly. *See, e.g.*, 25 U.S.C. § 478 (elections to be held "within one year after June 18, 1934"); *id.* § 461 (no allotment "[o]n and after June 18, 1934"). Moreover, the very next clause in Section 479 incorporates a specific date – "June 1, 1934." *Id.* § 479. If Congress had intended

to make the relevant date of federal recognition and jurisdiction June 18, 1934, it knew how to do so.[3]

The State's position also creates anomalies. Under the State's view, a Tribe that was recognized on June 18, 1934 but was later terminated remains eligible to receive lands in trust. That result – that a terminated Tribe would be eligible for benefits while a federally recognized Tribe would not – is nonsensical. *See also* NCAI Merits Br. 12-13 (noting additional anomaly with respect to 25 U.S.C. § 461). At a minimum, Congress's use of the term "now" is far from sufficiently unambiguous to foreclose the Secretary's regulations.

Nor does case law foreclose the Secretary's interpretation. The State relies on three cases in particular: *United States v. John*, 437 U.S. 634 (1978); *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004); and *United States v. State Tax Commission*, 505 F.2d 633 (5th Cir. 1974). We (and the Secretary) have demonstrated elsewhere that those cases are not dispositive, *see, e.g.*, NCAI Reh'g Opp. 9-11, and we will not repeat our analysis here. The critical point for present purposes, however, is that *none* of those cases construed Section 465 against the backdrop of the Secretary's duly promulgated regulations. Thus, even if those

[3] The State cites yet other provisions to show that Congress knew how to make clear that a provision applies "now or hereafter." State Reh'g Pet'n 6. But the existence of various drafting approaches within the IRA merely confirms the statute's ambiguity, underscoring the need to defer to the Secretary's formal interpretation.

cases reflected how a court would interpret an ambiguous statute if forced to do so – and they do not – the cases say nothing at all about whether the statute forecloses an alternative interpretation advanced by the agency entrusted to interpret it. *See, e.g.*, *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993).

The State's novel construction of Section 465, moreover, is at odds with other federal Indian statutes. In particular, the State's contention that the statute bars the Secretary from acquiring land under Section 465 for Tribes recognized after 1934 – which includes all Tribes recognized by the federal administrative recognition process – is flatly inconsistent with federal statutes that embody the view of Congress that the manner of federal recognition is irrelevant to the rights and privileges a Tribe possesses.

In 1994, for example, Congress added two subsections to the IRA for the very purpose of eliminating the precise distinctions the State contends here are mandatory. *See* 25 U.S.C. § 476(f) (prohibiting any federal regulation that "classifies, enhances, or diminishes the privileges and immunities available to [a federally recognized] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes"); *id.* § 476(g) (invalidating existing regulations creating distinctions in the privileges and immunities available to federally recognized Tribes); *see also* 140 Cong. Rec. S6144, S6147 (daily ed. May

19, 1994) (statement of cosponsor Sen. McCain) ("[O]ur amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law."); *id.* (statement of cosponsor Sen. Inouye) ("Each federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States. . . . This is true *without regard to the manner in which the tribe became recognized by the United States* . . . .") (emphasis added). Indeed, had regulations such as those the State believes are required been in place, they would have been eliminated by § 476(g), and § 476(f) would prevent their adoption in the future.[4]

That same federal policy is reflected in the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a *et seq.* (the "List Act"), which requires the Secretary to list all federally recognized Tribes, without distinguishing among Tribes by date or process of recognition, and by the Indian Land Consolidation Act ("ILCA"), Pub. L. No. 97-459, Title II, 96 Stat. 2517 (1983), which opens land-into-trust benefits of ILCA to all Tribes regardless of timing or manner of recognition, refuting the State's notion that Congress intended rigid lines between

[4] The State is wrong that § 476(f) and (g) have only limited scope. State Reh'g Pet'n 12-13. Although those provisions amend § 476, they plainly apply to *all* regulations. *See* 25 U.S.C. § 476(f) (prohibiting discrimination in regulations issued "pursuant to the Act of June 18, 1934 . . . or any other Act of Congress").

the exercise of § 465 authority for Tribes recognized in 1934, and the exercise of that authority for Tribes recognized thereafter. *See* NCAI Merts Br. 16-17.

The State's position is also at odds with the nature of recognition itself. *See Carcieri v. Norton*, 290 F. Supp. 2d 167, 179-81 (D.R.I. 2003). As this Court has stated, "Federal recognition is just that: recognition of a previously existing status." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994). To read the IRA as foreclosing application to Tribes federally recognized after 1934 is inconsistent with the understanding that the federal recognition process "acknowledges" a historical tribal existence. *See Narragansett Indian Tribe*, 19 F.3d at 694. *See also* NCAI Merits Br. 13-14 (noting additional problems with the State's position as it relates to the nature of recognition).

Unsurprisingly, the Secretary's regulations similarly reject against distinctions among federally recognized Tribes: a newly acknowledged tribe "shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a). The manner of federal recognition is simply irrelevant to the Secretary's trust authority.[5]

[5] The State's rigid reading of the IRA is in any event at odds with history. The Stockbridge-Munsee Tribe, for example, had its reservation terminated in 1906 so that, although it remained a federally recognized Tribe, it was no longer under federal supervision or jurisdiction. *Wisconsin v. Stockbridge-Munsee Comty*, 366 F. Supp. 2d 698, 723-24 (E.D. Wisc. 2004). It remained outside federal jurisdiction through

The State has two principal responses. First, the State emphasizes what it calls the "shocking fact" that there were few trust applications granted for non-IRA tribes from 1934 through 1978, that is, from the period from the passage of IRA until the creation of the administrative process for federal recognition. State's Reply Br. 7 (July 11, 2005); *see* State Reh'g Pet'n 14. But that is "shocking" only if one is blind to history. Much of that period of time (as the State surely knows) coincides with the shameful termination era, characterized by active efforts to terminate Tribes and the shameful forced assimilation of Indians throughout the Country. *See, e.g.*, Cohen, Handbook of Federal Indian Law § 1.06 (3d ed. 2005) (describing termination era). Given that neither Congress nor the Executive Branch was recognizing substantial numbers of new Tribes during that era – indeed, Congress was actively terminating existing Tribes – the absence of trust applications for non-IRA Tribes is not surprising.

Moreover, the absence of trust applications in this period is beside the point. This period pre-dates the Secretary's current regulations, adopted in 1980 (and now reflected in 25 C.F.R. Part 151). The State cannot point to any regulations prior to

---

the passage of the IRA, *id.* at 731, and under the State's theory the Tribe was permanently ineligible for IRA benefits. But that was not how John Collier saw it. The Secretary purchased land in trust for the Tribe, which then allowed the Tribe to come under federal jurisdiction and thus to reorganize under the IRA. *Id.* at 732-33. That is consistent with the broad purpose of the IRA as a mechanism for returning land to Tribes who had been rendered landless during the allotment era, and it is inconsistent with the State's notion that the IRA was intended to freeze the status quo in 1934.

1980 that took a contrary position. And even if it could, that would not help the State because an agency is free to change its mind. *See Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991). Here, the agency's current regulations – in place for more than a quarter of a century (since 1980) – foreclose the State's position.

Moreover, it is striking that the Secretary took land in trust for newly recognized Tribes as soon as administrative recognition began. The Grand Traverse Band, for example, was the first Tribe recognized pursuant to the federal recognition process – it was recognized in 1980. Since that time, the Secretary has taken 21 separate parcels in trust for the Tribe, the first in December 1981 and the most recent in March 2006. *See*, *e.g.*, *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.3d 960, 962 (6th Cir. 2004) (discussing one of Grand Traverse's trust acquisitions). Nor is Grand Traverse unique. Although there is neither space nor time for an exhaustive presentation of the Secretary's trust acquisitions, the Secretary has routinely taken land in trust for administratively recognized Tribes. *See, e.g.*, *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978) (discussing trust acquisition for Sault Ste. Marie Tribe of Chippewa Indians of Michigan which was recognized in 1972); 71 Fed. Reg. 5067 (Jan. 31, 2006) (taking land in trust for Snoqualmie Tribe, recognized in 1999); 67 Fed. Reg. 51867

(Aug. 9, 2002) (taking land in trust for Nottawaseppi Huron Band of Potawatomi Indians of Michigan, recognized in 1996).

That brings us to the State's second principal argument. The State contends that each of the Secretary's trust acquisitions for newly recognized tribes is either for a Tribe recognized and under federal supervision in 1934 or a Tribe recognized by statute and with specific statutory authorization for trust acquisitions. State Reh'g Pet'n 14-15; State Reply Br. 6-13 (Aug. 23, 2005). That is both irrelevant and demonstrably false. It is irrelevant, because even if the Narragansetts were the first post-IRA Tribe to receive land under § 465, that would not change that the trust acquisition is consistent with the Secretary's formal regulations interpreting an ambiguous statute. That alone suffices to dispose of the State's argument.

The State's argument is in any event untrue. To take just one example – space constraints prevent more – the State contends (without citation) that the Grand Traverse Band was federally recognized in 1934. State Reply R. 11 (Aug. 23, 2005). But the federal courts (and the United States) have repeatedly found to the contrary. Thus, the Sixth Circuit stated expressly that "in 1872, then Secretary of the Interior, Columbus Delano, improperly severed the relationship between the Band and the United States, *ceasing to treat the Band as a federally recognized tribe.*" *Grand Traverse Band*, 369 F.2d at 961 (emphasis added); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for*

the Western District of Michigan, 198 F. Supp. 2d 920, 924 (W.D. Mich. 2002) ("Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe."). The Grand Traverse Band was plainly not federally recognized in 1934, and thus the Secretary's multiple trust acquisitions on behalf of that Tribe are clear precedent for the acquisition at issue here.[6]

That is no surprise, for the State's position is untenable. That is, under the State's view that these Tribes were already recognized in 1934, the newly recognized Tribes have spent hundreds of thousands of dollars and decades of their lives striving for administrative recognition when, in fact, federal recognition was already theirs. The State simply misunderstands what constitutes federal recognition.[7] To our knowledge, none of the Tribes who have been administratively recognized are on the list of Tribes eligible to vote under the IRA in 1934, which is all but dispositive of the State's argument. Moreover, as the experience of the Stockbridge-Munsee suggests, *see* supra note 5, federal recognition and federal

---

[6] The State's argument relies on the assumption that a treaty between a Tribe and the United States in the 1800s demonstrates that the Tribe was recognized in 1934. *See, e.g.*, State Reply Br. 9, 11 (Aug. 23, 2005) (relying on treaty of 1833 to "establish" 1934 recognition of Huron Potawatomi); (relying on treaty of 1855 to "establish" 1934 recognition of Grand Traverse). But that is false. *See, e.g.*, *Grand Traverse Band*, 369 F.3d at 961 (noting that federal recognition ended in 1872 despite Tribe's participation in 1855 Treaty of Detroit).

[7] The State's suggestion that the role of administrative recognition was to re-recognize Tribes terminated in the termination era is silly. State Reh'g Pet'n 7 n.4. An agency cannot overrule Congress, a point that the recognition regulations acknowledge expressly. *See* 25 C.F.R. § 83.7(g).

jurisdiction were different concepts – the State's effort to prove that Tribes were recognized in 1934 says nothing about whether they were under federal jurisdiction or supervision at that time.

The State is thus wrong to suggest that its reading of Section 465 will have limited impact. The Secretary has recognized dozens of Tribes administratively since 1934, *see* NCAI Reh'g Opp. 5-6, and if the State's view were to prevail, none of these Tribes would be eligible for further land acquisitions.[8] Indeed, the problems the State's radical re-interpretation would cause extend far beyond the Secretary's trust authority. The definition of "Indian" in Section 479 triggers eligibility not just for trust acquisitions but also for an array of federally administered or federally funded benefits and services, including Indian schooling, preference in employment within the Bureau of Indian Affairs and the Indian Health Service, and other federal benefits that form the backbone of the government-to-government relationship that the United States currently honors with nearly 600 American Indian Tribes. Tribes recognized after 1934 would be ineligible for many of these essential programs, radically altering the impact of federal recognition and having a devastating effect on tribal welfare.

[8] The State also invokes the Quiet Title Act to obscure the consequences of its argument. That response is disingenuous. The State's representations are artfully phrased to avoid conceding that the Quiet Title Act would actually bring repose, and the Quiet Title Act – which applies only to completed trust acquisitions – offers no comfort to the dozens of Tribes recognized since 1934 that would be denied the benefits of Section 465 in the future. *See* NCAI Reh'g Opp. 14-15.

Finally, endorsing the State's argument on the unique circumstances of this case is particularly ill-advised because there is independent authority for trust acquisition here. Section 203 of ILCA applies "[t]he provisions of section 465" broadly to "all tribes." 25 U.S.C. § 2202. Section 202 of ILCA defines "tribe" as "any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust," id. § 2201(1), and defines "Indian" in relevant part as "any person who is a member of any Indian tribe," id. § 2201(2). The Narragansetts have 1800 acres of land (apart from the 31 acres at issue here) held in trust by the United States, and thus the Tribe meets ILCA's definition of "tribe." *See id.* § 2201(1). Under § 2202, the exercise of the Secretary's trust-acquisition authority for the Narragansetts was plainly proper.[9]

CONCLUSION

The State's contention that the Secretary lacks authority under Section 465 to acquire land in trust for Tribes recognized after 1934 should be rejected.

[9] Amici have not addressed issues relating to the Rhode Island Settlement Act. That said, to the extent that the State seeks a determination of the jurisdictional consequences of the trust acquisition, Amici believe the State's request is not ripe, and Article III precludes this Court from addressing it absent a concrete dispute. The State pushes this Court to decide the issue precipitously by raising the specter that the Tribe will use the land for gaming or to sell tax-free cigarettes. But IGRA generally limits gaming on newly acquired lands absent the State's consent, *see* 25 U.S.C. § 2719, and the Supreme Court has made clear that a State can easily devise tax schemes that collect taxes for cigarettes ultimately sold on tribal land, *see Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

Respectfully submitted,

_____

Riyaz A. Kanji
Kanji & Katzen, PLLC
201 South Main Street
Suite 1000
Ann Arbor, MI 48104
(734) 769-5400

Ian Heath Gershengorn
Counsel of Record
Sam Hirsch
Jenner & Block LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Richard Guest
Native American Rights Fund
1712 N Street, N.W.
Washington, DC 20036
(202) 785-4166

John Dossett
National Congress of
American Indians
1301 Connecticut Ave., N.W.
Washington, DC 20036
(202) 466-7767

CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, hereby certify that I have this 26th day of December, 2006, caused copies of the Supplemental En Banc Brief for Amici Curiae National Congress of American Indians, Individual Indian Tribes, and Tribal Organizations in Support of Defendants-Appellees to be served by First Class Mail on the following:

William B. Lazarus
Judith Rabinowitz
David C. Shilton
Elizabeth Ann Peterson
Attorneys, Env't & Nat. Res. Div.
U.S. Department of Justice
P.O. Box 237954, L'Enfant Station
Washington, D.C. 20026

Richard Blumenthal
Attorney General
Susan Quinn Cobb
Ass't Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120

Larry Long, Attorney General
John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

Claire Richards
Special Counsel
Room 119, State House
Providence, RI 02903

Patrick C. Lynch, Attorney General
Neil F. X. Kelly
Ass't Attorney General
150 South Main Street
Providence, RI 02903

Joseph S. Larisa, Jr.
Assistant Solicitor for Indian Affairs
Town of Charlestown
1100 Citizens Plaza
Providence, RI 02903

Charles A. Hobbs
Hobbs, Straus, Dean & Walker, LLP
2120 L Street, NW
Suite 700
Washington, DC 20037

C. Bryant Rogers
Roth, Van Amberg, Rogers,
Ortiz & Yepa
P.O. Box 1447
Sante Fe, NM 87504-1447

_____

Ian Heath Gershengorn