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; STATE OF RHODE ISLAND and PROVIDENCE PLANTATIONS; TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs-Appellants

v.

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

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE FEDERAL APPELLEES

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OPINION BELOW

The opinion of the district court is published at 290 F. Supp. 2d 167 (D. R.I. 2003). It is reproduced as Addendum 1 to the Appellants' Joint Memorandum of Law ("Add. 1").

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and the Administrative Procedure Act, 5 U.S.C. 706.

The district court entered final judgment on September 29, 2003. A timely notice of appeal was filed on November 26, 2003. This Court's jurisdiction rests on 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether the Narragansett Tribe is entitled to the benefits of Section 5 of the Indian Reorganization Act, 25 U.S.C. 465 ("IRA"), which authorizes the Secretary of the Interior ("Secretary") to take land into trust for the benefit of tribes.

2. Whether the 1978 Rhode Island Indian Claims Settlement Act prohibits the Secretary's exercise of her authority to take lands into trust for the Narragansett Tribe.

3. Whether Section 5 of the IRA constitutes an unlawful delegation of congressional authority, or offends the Enclave Clause, the Admissions Clause or the Tenth Amendment of the Constitution.

4. Whether the Secretary complied with the Administrative Procedure Act in taking lands into trust for the Narragansett Tribe; in particular,

a. Whether BIA complied with the requirements of the National Environmental Policy Act ("NEPA") in deciding to accept the Housing Lands in trust.

b. Whether BIA complied with the requirements of the Coastal Zone Management Act ("CZMA") in approving the fee-to-trust application.

c. Whether the Indian Gaming Regulatory Act ("IGRA") contains any requirement applicable to the Narragansett Tribe's fee-to-trust application.

STATEMENT OF THE CASE

This case is a challenge by the State of Rhode Island, the Governor of Rhode Island, and the Town of Charlestown, Rhode Island (hereinafter collectively the "State"), to a decision by the Secretary of the Interior to take 31 acres of land owned in fee by the Narragansett Tribe into trust for the Tribe. The Secretary

currently holds 1800 acres of land (the "Settlement Lands"), which were granted to the Tribe pursuant to the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701-1716 ("Settlement Act"), in trust for the Tribe.

The 31 acres of land at issue ("Housing Lands") were purchased by the Tribe's housing authority in 1991 for the purpose of constructing low-income housing for tribal members. The housing authority conveyed the lands to the Tribe in 1992, with the understanding that the property would be placed in trust for the Tribe by the federal government for the purpose of providing housing for tribal members. The Tribe then applied for trust acquisition of the property by the Secretary of the Interior, who approved the request and directed that the lands be accepted into trust (App. 16; App. 20). The State appeals from the district court's ruling that the IRA authorizes this decision and that the decision was not foreclosed by the Settlement Act. The State further asserts that the district court erred in failing to invalidate Section 5 as an unconstitutional delegation of legislative authority and to rule that trust acquisition of land for Tribes violates the constitutional rights of states.

STATEMENT OF FACTS

A. Statutes Involved

1. The IRA, 25 U.S.C. 465, provides, in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments * * * for the purpose of providing land for Indians.
>
> * * * * *
>
> Title to any lands or rights acquired * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired * * *.

2. The Rhode Island Indian Claims Settlement Act is set out in its entirety as

Addendum 4 to the State's opening brief.

B. Historical Background

1. The Narragansetts' land claims and the Settlement Lands

The Narragansetts were aboriginal inhabitants of what is now Rhode Island. See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158 F.3d 1335, 1336 (D.C. Cir. 1998) (citing William G. McLoughlin, Rhode Island, 4-5 (1978)). The Tribe successfully resisted the State's efforts to extinguish its tribal identity until 1880, when the Narragansetts agreed to sell (for $5,000) all but two acres of their land and to abolish tribal authority, an agreement they concluded almost immediately had been a mistake (id.). The Tribe's efforts to regain its aboriginal land culminated in 1975, when the Narragansetts sued the State of Rhode Island and individual landowners to recover 3,200 acres of land in Charlestown to which the Indians asserted that aboriginal title was unextinguished, because the 1880 sale had violated the Trade and Intercourse Act of 1790, 25 U.S.C. 177 (See Add. 1 at 3; Narragansett Tribe v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976)). At the time of its lawsuits, the Narragansett community was not a federally recognized tribe, but rather was incorporated as a Rhode Island nonbusiness corporation known as the Narragansett Tribe of Indians.[1/]

a. The Settlement Agreement

The Narragansetts' land claims were settled in 1978, after lengthy multilateral negotiations involving the Narragansetts, the Governor of Rhode Island, the Charlestown Town Council, and many private landowners. Town of Charlestown v. United States, 696 F. Supp. 800, 802 (D.R.I. 1988), aff'd, 873 F.2d

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[1/] Under the state's "detribalization" act, the Tribe yielded its tribal identity in exchange for Rhode Island citizenship in 1880. Descendants of the 1880 Tribe incorporated as a state-chartered corporation in 1934. See 48 Fed. Reg. 6177-05.

1433 (1st Cir. 1989) (table). The settlement was memorialized in a Joint Memorandum of Understanding ("JMOU") (Add. 3).

The settlement conferred 1800 acres of land on the Narragansetts. Rhode Island granted the Narragansetts 900 acres of state-owned land, and the federal government agreed to allocate funds to purchase an additional 900 acres of privately-owned land (Add. 3 pp. 1-2) The JMOU transferred the Settlement Lands to a corporation formed "for the purpose of acquiring, managing and permanently holding" the lands in trust for the descendants of those Narragansetts listed on the 1880 tribal roll (id. at 1). The JMOU further provided that the Narragansetts had the same right as other Indian groups to petition for federal acknowledgment (id.).

b. The federal and state legislation implementing the settlement

The JMOU required federal implementing legislation (Add. 3 at 2). Consequently, in 1978, Congress enacted the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701-16 (Add. 4). Among other things, the Settlement Act authorized the federal funds needed to purchase the 900 acres of privately owned land. The statute provided that in the event of federal recognition of the Narragansett Tribe, any action to alienate the Settlement Lands would be valid only if approved by the Secretary (25 U.S.C. 1707(c)). The required State implementing legislation, the Narragansett Indian Land Management Corporation Act, was passed in 1979 (6A R.I. Gen. Laws 37-18-1 et seq.). Following the passage of the implementing legislation, the Settlement Lands were transferred to the corporation.

c. The status of the Settlement Lands following federal recognition

In 1983, the Secretary formally acknowledged the Narragansett Tribe as a

federally recognized tribe (48 Fed. Reg. 6177). In 1985, the State transferred the Settlement Lands to the Tribe, and the corporation was dissolved (6A R.I. Gen. Laws 37-18-12 to 18-14). In 1988, the Tribe requested that the Settlement Lands be taken into trust by the federal government pursuant to Section 5 of the IRA, 25 U.S.C. 465. The Tribe's application was approved by the Bureau of Indian Affairs ("BIA"). See Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 67 (1989). See also Town of Charlestown, supra, 696 F. Supp. at 805-806. The United States accepted the Settlement Lands in trust for the Tribe in September 1988.

2. **The Housing Lands**

The 31 acres that are the subject of this suit are outside the Tribe's Settlement Lands but are separated from those lands only by a Town road. The Narragansett Indian Wetuomuck Housing Authority ("NIWHA") purchased the land from a private developer in 1991.[2/] The United States Department of Housing and Urban Development ("HUD") provided NIWHA with funding to purchase the 31-acre parcel and construct a 50-unit tribal housing development. See Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. 349, 353-54 (D. R.I. 1995), aff'd in part, rev's in part on other grounds, 89 F.3d 908 (1st Cir. 1996). The purpose of the project was to provide housing that was affordable and appropriate for tribal elders. On May 29, 1992, NIWHA conveyed the parcel to the Tribe. The deed from NIWHA to the Tribe expressed the intent that the parcel be "placed in trust with the United States Government for the purpose of affording housing to tribal members." Id. at 354. The Tribe leased the land back to NIWHA

[2/] NIWHA was created by the Tribe in 1987 and recognized by HUD as an Indian housing authority eligible to receive funds for participation in HUD-sponsored Indian housing programs.

pursuant to a BIA-approved lease (AR Vol. IV, Tab B, Exhibit 3 (Supp. App. 114)).

In the early 1990s, the Tribe and its housing authority commenced construction of the tribal housing project, building eighteen foundations, on which prefabricated houses have been placed.[3/] These houses have remained unfinished and unoccupied since the summer of 1994 due, inter alia, to litigation brought by the State of Rhode Island and the Town of Charlestown over the applicability of state and local law to the Tribe's housing development. See Narragansett Indian Tribe v. Narragansett Electric Co., supra, 89 F.3d 908.

3. The Tribe's trust application

In October 1993, during the Narragansett Electric Co. litigation, the Tribe applied to have the United States take the Housing Lands into trust (App. Tab 6). That application was held in abeyance during the pendency of the Narragansett Electric Co. litigation, which finally concluded in 1996 (App. 19). In July 1997, the Tribe submitted another application to the Eastern Area Office of the BIA for trust acquisition of the Housing Lands. (App. Tab 5). The renewed application reiterated the Tribe's intent to complete a housing development to remedy the "lack of decent, safe, and affordable housing available to Narragansett Indian Tribal members" (id. 7/17/97 memo at 5).

The Bureau processed the application under the regulations found at 25 C.F.R. Part 151. In addition to a staff-level memorandum evaluating the Tribe's application against the Part 151 factors (App. Tab 8), the record before the Area Director, to whom the Secretary has delegated authority to make fee-into-trust

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[3] Prior to purchase by NIWHA, the parcel had been platted and subdivided for an eleven-unit development of single family homes. The prior owner completed some road and drainage improvements which were conveyed to the Town as part of the subdivision process (Supp. App. 114).

decisions, included legal analysis of jurisdictional issues raised by the Governor of Rhode Island, environmental analysis, title documents and analysis, comments in opposition from the State and the Town of Charlestown, and letters of support for the trust acquisition from HUD. On March 6, 1998, the Area Director informed the Tribe of his decision to approve the Tribe's application for trust acquisition of the 31 acres "acquired for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and [HUD]" (App. Tab 16). The decision letter was sent to the State and the Town of Charlestown informing them of their right of appeal to the Interior Board of Indian Appeals ("IBIA") (id.).

4. The State's administrative challenge

The State and the town filed appeals of the Area Director's March 6, 1998, decision with the IBIA (App. Tab 17-19). On June 29, 2000, following full briefing of the issues, the IBIA issued a decision affirming the trust acquisition decision and denying the appeals. Town of Charlestown, Rhode Island and Governor, State of Rhode Island and Providence Plantations v. Eastern Area Director, Bureau of Indian Affairs, 35 IBIA 93 (2000) (App. Tab 20). The State then initiated this suit against the Secretary of the Interior and the Director of the Eastern Regional Office of the Bureau of Indian Affairs, alleging that the trust acquisition was contrary to law.

5. The proceedings in district court

In the district court, the State sought to invalidate the trust acquisition of the Housing Lands on multiple grounds: that the Secretary's decision did not comply with the applicable law and should be reversed under the APA; that the Settlement Act precluded the trust acquisition of any lands in Rhode Island; that the Indian

Reorganization Act does not apply to the Narragansett Indian Tribe; and that Section 5 of the Indian Reorganization Act itself is unconstitutional. On cross-motions for summary judgment, the district court rejected every theory advanced by the State and affirmed the Secretary's decision. This appeal followed.

SUMMARY OF ARGUMENT

1. Section 5 of the IRA, which authorizes the Secretary to acquire land in trust for tribes, applies to the Narragansett Tribe in Rhode Island. The IRA provides that all federally recognized tribes are entitled to the same privileges and immunities. Moreover, the Narragansett Tribe has been acknowledged as a tribe in continuous existence since at least the 1600's, and therefore unquestionably was a tribe in 1934. The language of the IRA does not restrict its benefits to tribes that were both recognized and under federal jurisdiction on the date of its enactment. Not only has the Supreme Court rejected the test on which the State relies, but Congress has made clear that the Secretary *may not* discriminate among recognized tribes.

2. Nor does the Settlement Act preclude the Secretary's decision to accept the Housing Lands in trust for the Tribe. No provision of the JMOU or the Settlement Act states that lands outside the Settlement Lands may not be acquired or held in trust. The argument that extinguishment of the Tribe's aboriginal title claims impliedly extinguished the Tribe's right, and the Secretary's authority, to acquire lands in trust for the Tribe's benefit is fundamentally flawed and unsupported.

3. The policy of reversing the loss of Indian lands and encouraging tribal self-determination, stated on the face of the IRA, sets limits on the discretion granted to the Secretary in IRA Section 5, which does not offend the non-delegation doctrine. The IRA's purposes and definitions provide adequate standards for the exercise of the Secretary's discretion. The acceptance of land into trust for tribes does not unconstitutionally diminish State sovereignty, and State consent to such acceptance is not required by the Enclave Clause. Land held in trust for tribes is not equivalent to a federal enclave, nor is all State jurisdiction

"ousted" from such lands. And, because tribal sovereignty is not equivalent to statehood, taking the Housing Lands into trust did not offend the Admissions Clause by allowing the Tribe's exercise of territorial sovereignty within an existing state. Regulation of Indian affairs is among the federal government's enumerated powers. The trust acquisition therefore also is consistent with the Tenth Amendment.

4. The record demonstrates that the Secretary made a reasoned decision that is entitled to deference pursuant to the APA. The Secretary's decision is thoroughly grounded in the relevant law and regulations, has been upheld by the Interior Board of Indian Appeals ("IBIA"), and was properly affirmed by the district court.

ARGUMENT

I

THE NARRAGANSETT TRIBE IS A TRIBE WITHIN THE MEANING OF THE INDIAN REORGANIZATION ACT

The State and its *amici* assert (Br. 20-29; Amicus Br. 5-11) assert that the Secretary lacks authority under Section 5 of the IRA, 25 U.S.C. 465, to approve the Tribe's trust application, because the Narragansett Tribe is not covered by the IRA. It argues that the IRA applies only to tribes that were both federally recognized and under federal jurisdiction in June of 1934, and that the Narragansett Tribe was neither recognized nor under federal jurisdiction on that date. As the district court correctly concluded, the IRA contains no such limitation.

Section 5 provides in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments * * * for the purpose of providing land for Indians. * * * Title to any lands or rights acquired * * * shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired

25 U.S.C. 465. The State argues that the definitions of "Indian" and "tribe" in 25 U.S.C. 479 limited this authority, such that it may be exercised only on behalf of certain tribes that were federally recognized at the time of the statute's enactment. Those definitions state that:

> 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, and shall further include all other persons of one-half or more Indian blood ...
>
> The term "tribe" * * * shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

25 U.S.C. 479 (2000).

The State asserts (Br. 23) that this "plain language of the statute" establishes a "two-prong test," and that the benefits of the IRA are available only to Tribes that were both 1) recognized in 1934, and 2) under federal jurisdiction in 1934. The district court correctly rejected this interpretation of the IRA's language.

1. Congress has recently clarified that the Indian Reorganization Act applies to all federally recognized tribes, regardless of their acknowledgment status on the date of its enactment.

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act, Pub. L, 103-454, 108 Stat. 4791, which requires the Secretary of the Interior to keep a list of all federally recognized tribes, which "should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians." That statute, codified as 25 U.S.C. 479a, defines "tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. 479a(2). The House Report accompanying the List Act explains that federal recognition "establishes tribal status for all federal purposes." H.R. REP. NO. 103-781, at 3 (1994). Earlier the same year, Congress amended the IRA (Pub.L. 103-

263, 108 Stat 707) to clarify that:

> [d]epartments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 * * * with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. 476(f), and that any such determination by a federal agency that would have the effect of discriminating among recognized tribes, "shall have no force or effect." 25 U.S.C. 276(g). In enacting these amendments, Congress's purpose was "to clarify that section 16 of the Indian Reorganization Act [which permits tribes to organize under the IRA] was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes." 140 Cong. Rec. S6144-03, S6146 (daily ed. May 19, 1994) (Statement of Sen. McCain).

The federal acknowledgment regulations pursuant to which the Tribe attained federal recognition echo these enactments. The regulations provide, in relevant part, that,

> Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. <u>The newly acknowledged tribe shall be considered a historic tribe and 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</u>. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

25 C.F.R. 83.12(a) (emphasis added).

As these statutory and regulatory provisions make clear, the Secretary's IRA authority extends to the Narragansett Indian Tribe regardless of the status of its acknowledgment in 1934. Indeed, the Secretary is precluded by these provisions from making the determination sought by the State here, that the Tribe is ineligible

for the benefits of Section 5 of the IRA because its acknowledgment occurred after the enactment of the IRA. Such a determination would diminish the Tribe's privileges in relation to other federally recognized tribes, contrary to the IRA's plain language.

The State asserts (Br. 35) that the Tribe's acknowledgment in 1983 cannot "bootstrap" the Tribe into the definition set out in the IRA. But this approach, which would " bind the government by its earlier errors or omissions" (City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157 (D.D.C. 1980)), is contradicted by Congress's recent declarations that all federally recognized tribes must be afforded the same privileges and immunities under federal law. As the district court correctly observed, 290 F.Supp.2d at 179, under the State's interpretation of the IRA, "any tribe, including the Narragansetts, that was afforded federal recognition subsequent to June 1934 does not qualify as an 'Indian tribe' pursuant to section 479." The plain language of the IRA as amended prohibits this result.

B. The courts have rejected the "two-prong test" advocated by the State.

The State argues (Br. 23) that case authority supports its view that Tribes that were not both acknowledged and under federal jurisdiction prior to 1934 may not benefit from the provisions of the IRA. The State improperly relies on two cases involving the unique circumstances of the Mississippi Choctaw Indians. See United States v. State Tax Comm'n, 505 F.2d 633, 642 (5th Cir. 1974); United States v. John, 437 U.S. 634, 650 (1978). Both cases predate the amendments discussed above. Moreover, neither case supports the State's "two-prong test," and John instead rejects it.

The Fifth Circuit's United States v. John, 560 F. 2d 1202 (5th Cir. 1977), relied on its earlier conclusion in State Tax Comm'n, supra, 505 F.2d at 642-43,

that because the Mississippi Choctaws were not a "tribe" and did not reside on a reservation when the IRA was passed in 1934, the IRA did not apply to them. John, 437 U.S. at 650 & n.20.[4/] The Supreme Court in John reversed this conclusion, finding that the Mississippi Choctaws "were not to be excepted from the general operation of the 1934 Act." Id. It held instead that this Indian group was entitled to the protections of the IRA, and that lands acquired in trust for these Indians constituted a reservation, noting that certain deeds were acquired in trust for these Indians "until such time as the Choctaw Indians of Mississippi shall become organized pursuant to [the IRA] and then in trust for such organized tribe." Id. at 651 & n.20. There accordingly is no support in John for the State's "two prong test" for IRA applicability; instead, John stands for the contrary conclusion that the IRA may be invoked for the benefit of groups that were not recognized as tribes in 1934.

Moreover, as the district court explained, 290 F. Supp. 2d at 180, the Mississippi Choctaws' tribal status had been extinguished by a federal treaty prior to 1934. The Fifth Circuit's conclusion that a tribe that unquestionably had ceased to exist prior to June, 1934, was not covered by the statute (State Tax Commission,

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[4/] Even if this conclusion did not predate the 1994 amendments, it is of questionable viability at best. Following denial of rehearing and rehearing en banc, in State Tax Commission, the Solicitor General of the United States notified the Fifth Circuit, which was then considering a related issue in United States v. John, 560 F.2d 1202 (1977), that the United States would not seek certiorari in State Tax Commission, although the Court had incorrectly concluded that the Mississippi Choctaws are not a tribe, because this conclusion was unnecessary to the Court's resolution of the case. See John, 560 F.2d at 1205. The Fifth Circuit in John held, consistent with Tax Commission, that the IRA did not authorize the acquisition of a trust reservation that could be considered as "Indian Country" for the Mississippi Choctaw Band because it was not recognized as a tribe in 1934. This conclusion was reversed by the Supreme Court in United States v. John, 437 U.S. 634 (1978).

supra, 505 F. 2d at 642) need not be interpreted as limiting tribal status to tribes that were both recognized and under federal jurisdiction as of June 1934. Tribes such as the Narragansett, which have been acknowledged pursuant to the regulations contained in 25 C.F.R. Part 83, have been determined to have had tribal existence continuously, both before and since June 1934, even though that determination was made at a later date. In acknowledging the Narragansett Tribe, the Secretary found that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983). "The tribe has a documented history dating from 1614." Id. As this Court observed in Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir.1994), "[f]ederal recognition is just that: recognition of a previously existing status." The Narragansett Tribe's acknowledgment in 1983 established that it was a Tribe entitled to a government-to-government relationship with the United States and to the protections and benefits that accompany that relationship long before its formal acknowledgment was granted. See 290 F. Supp. 2d at 167; and see City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 161 (D.D.C.1980) ("[A]lthough the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934"). Unlike the Mississippi Choctaws, the Narragansetts have maintained tribal relations since the first European contact with them, and State Tax Comm'n therefore is inapposite, even if it is good law.

II

THE RHODE ISLAND INDIAN CLAIMS SETTLEMENT ACT DOES NOT PRECLUDE TRUST ACQUISITION OF THE HOUSING LANDS

As discussed above, the Settlement Act was enacted to implement a multilateral settlement agreement arising from the Tribe's claim to aboriginal title to 32,000 acres of land in Rhode Island. The purpose of the Settlement Act was to implement the JMOU, which extinguished clouds on land titles arising from the Tribe's aboriginal land claims, while offering the Tribe compensation and other remedies in exchange. See 25 U.S.C. 1701; H.R. REP. 95-1453, at 5, 95th Cong. 2d Sess. (1978) (purpose of Settlement Act is to implement settlement agreement regarding Tribe's aboriginal land claim). See Connecticut ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82, 90 (2d Cir. 2000) (settlement act enacted to implement settlement of aboriginal title claims, not to resolve once-and-for-all geographical extent of Tribe's sovereignty).

The State argues (Br. 32-33), without citation to any authority, that with the Settlement Act, the "State bargained for and obtained a guarantee that its laws and jurisdiction – and not that of the federal government or of any Indian tribe – would continue to apply throughout the State, including on the Settlement Lands." Starting from this faulty premise, the State weaves a confusing tapestry of facts and assumptions leading to its assertion that the Settlement Act precludes any trust land acquisition for the Tribe in Rhode Island. Although no provision of the JMOU or the Settlement Act so states – or addresses the question – the State maintains that the Tribe negotiated away its rights under federal law to have land held in trust by the United States, as well as the United States' statutory authority to acquire land in trust for the Tribe in Rhode Island, when it settled its aboriginal title claims. The State's position finds no support in the language of the Settlement Act and is

founded on a misunderstanding of basic concepts of federal Indian law.

A. The Settlement Act did not impair the Secretary's authority to take lands into trust for the Narragansett Tribe

As the district court correctly concluded, "[a]lthough §§ 1705 and 1712 reveal an intent to resolve *all* claims, whether for possession or damages, that are premised upon the Narragansetts' assertions of aboriginal right, the provisions do not reveal an intent otherwise to restrict the tribe's legal rights and privileges, including those benefits which became available to the tribe upon attaining federal acknowledgment in 1983." 290 F. Supp. 2d at 183. The State (Br. 37) attacks this conclusion on appeal, both on grounds that extinguishment of aboriginal title claims inherently includes the extinguishment of tribal sovereignty, and as a matter of statutory construction. Neither argument finds any support in the law.

The Settlement Act provides that:

> [B]y 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). The State interprets this language (Br. 36) as a prospective relinquishment of all claims by the Tribe and the United States arising from any later-acquired interest in lands in Rhode Island. But the statute is plainly addressed to the extinguishment of Indian aboriginal land claims in the state of Rhode Island. It does not prohibit future land transactions, such as the purchase of lands in Rhode Island by the Tribe or the trust acquisition of lands outside the Settlement Lands by the United States. Neither the JMOU nor the Settlement Act reflects the "bargain"

upon which the State rests its claim.[5/]

Just as the Settlement Act does not preclude the Tribe from acquiring lands outside the Settlement Lands, it does not preclude the Secretary from holding such lands in trust for the Tribe's benefit. Indeed, the Settlement Act did not even refer to the IRA, although it explicitly anticipated that the Tribe might eventually be federally acknowledged, 25 U.S.C. 1707(c)), and the JMOU it implemented expressly provided that the Tribe would "have the same right to petition for [federal] recognition and services as other groups" (Add. 4 ¶ 15). This omission is significant. In the Maine Settlement Act, 25 U.S.C. 1724(e), Congress expressly precluded application of Section 5 of the IRA. Surely if Congress had intended such a limitation in the Rhode Island Settlement Act, it would have made the limitation explicit, as it did in the Maine Settlement Act. As the Second Circuit found in Connecticut ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82, 90 (2d Cir. 2000), "[t]he absence of an analogous provision in the [Connecticut] Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe." Similarly here, neither the JMOU nor the Settlement Act addressed the Secretary's authority to acquire lands in trust for the Tribe. The district court therefore correctly concluded that "[t]he Settlement Act does not expressly preclude or otherwise restrict the acceptance of non-settlement lands into trust for the benefit of the Narragansetts pursuant to 25 U.S.C. 465." 290 F. Supp. 2d at 182.

[5/] The Interior Board of Indian Appeals rejected the identical argument, raised by the Town in its administrative appeal of the Secretary's decision to take the Settlement Lands into trust, concluding that "[t]he Board finds nothing in the Settlement Act that precludes trust acquisition of the settlement lands or imposes any requirements for their acquisition beyond those contained in 25 C.F.R. Part 151." 18 IBIA at 71.

In Blumenthal, supra, 228 F.3d 82, the State of Connecticut argued that the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. 1751 (2001), should be interpreted to bar the application of the IRA on lands outside the Mashantucket Pequot Indian Nation's settlement lands. The Second Circuit found that the Connecticut Settlement Act could not override the IRA because it addressed only lands purchased with specified funds, and was "silent with regard to lands * * * not purchased with settlement funds." Id. at 88. "Nothing in [the Connecticut Settlement Act] supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds." Id. Likewise here, because the Rhode Island Settlement Act is silent regarding the status of lands purchased by the Tribe outside its settlement area, nothing in the Settlement Act supplants the Secretary's power under the IRA to accept land into trust.

Interpreting the Settlement Act as a prohibition on future trust land acquisitions for the benefit of the Narragansetts, in the absence of any statutory provision containing an express prohibition of such trust acquisitions, moreover, would require a conclusion that the Settlement Act impliedly repealed Section 5 of the IRA with respect to the Tribe. Well-established canons of statutory construction dictate against such an interpretation. First, "repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)). In Morton, plaintiffs argued that a later-enacted statute was intended to repeal a "longstanding, important component of the Government's Indian program." Id. at 550. In rejecting that argument, the Court held that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Id. (citing Georgia v. Pa. R.R. Co.,

324 U.S. 439, 456-57 (1945)). Here, there is no conflict between the Settlement Act, which merely settled the Tribe's aboriginal land claims, and the IRA, which is a pillar of federal Indian policy. "The Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. at 551. See also United States v. Borden Co., 308 U.S. 188, 198 (1939).

Additionally, as the district court observed, statutes enacted for the benefit of Indians "are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." 290 F. Supp. 2d at 182-83, citing Chickasaw Nation v. United States, 534 U.S. 84, 93-94 (2001). In particular, statutes that impact upon Indian sovereignty are viewed from a "distinctive perspective." Narragansett Indian Tribe of R. I., 89 F.3d at 914 (quoting Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 691 (1st Cir.1994)). "[I]t is well established that '[a] congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'" Id. (quoting Mattz v. Arnett, 412 U.S. 481, 505 (1973)). The State's argues that the Settlement Act should be construed to deprive the Tribe of critical benefits provided under the IRA, a statute fundamental to federal Indian programs. To the contrary, the statutes should be harmonized and interpreted to benefit the Tribe.

B. The settlement of the Tribe's aboriginal title claims did not extinguish or otherwise affect the Tribe's retained sovereignty or the Secretary's authority to acquire lands in trust for the Tribe.

Just as the Settlement Act contains no limit on the application of the land-into-trust provisions of the IRA, it also contains no limit on the Tribe's exercise of

sovereign powers over lands outside the Settlement Lands. The State erroneously equates (Br. 37) the "claims" extinguished by the settlement with the sovereign authority of the Tribe. But the settlement was premised on the Tribe's claims of unextinguished possessory interests in land, and had no effect on tribal sovereignty. Contrary to the State's assertion (Br. 35), aboriginal title does not encompass tribal sovereignty, and no court has ever held that by ceding aboriginal title to its lands a Tribe extinguishes any retained sovereignty it possesses with respect to those or other lands in which it later acquires an ownership interest.

Aboriginal title is the right of Indian Tribes to use and occupy "land they had inhabited from time immemorial." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). Aboriginal title may be extinguished only by the federal government. See Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974). As the Court explained in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (taking claim based on aboriginal title not compensable), aboriginal title is an outgrowth of the doctrine of conquest. Under that doctrine, the conquering Europeans were entitled to assert sovereignty over all Indians and their lands. Indians were permitted to occupy the lands over which they previously had exercised sovereignty at the pleasure of the conquering sovereign.

The State asserts (Br. 35-36) that "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," citing various inapposite decisions regarding the assertion of aboriginal title claims against the United States. The State misleadingly implies that aboriginal title claims arise from and encompass any claim the Tribe might have of power to assert sovereign authority to the exclusion of the state. There is no support for this

proposition, which is addressed in none of the authorities cited by the State. The State concludes (Br. 36), based on this unsupported premise, that the settlement extinguishing the Tribe's aboriginal title claims included the extiguishment of tribal sovereignty. This conclusion, even if it followed from the State's faulty premise, is contrary to law.

The State's conclusion that the Tribe has ceded its power to assert sovereignty over lands that are not governed by the settlement rests on the premise that tribal sovereignty inheres in aboriginal title. To the contrary, aboriginal title claims assert the right to occupy lands, not to exercise sovereignty over them. A tribe to which aboriginal lands are restored may seek to have its restored lands taken into trust by the United States. 25 U.S.C. 465. Such tribal trust lands ordinarily are exempt from certain state laws. See Blumenthal, supra, 228 F.3d at 85-86 (2d Cir. 2000) (land taken into trust pursuant to the IRA generally is not subject to state or local taxation, local zoning and regulatory requirements, or, absent tribal consent, state criminal and civil jurisdiction). An aboriginal title claim, however, is not an "attack" on state sovereignty, but rather is an assertion of the right to occupy lands in which the tribe continuously has held an unextinguished possessory interest that is protected by federal law. Oneida, supra, 470 U.S. at 234. Any "ouster" of state jurisdiction would result from the United States' assertion of its constitutional authority over Indian affairs, including the protection of Indian lands against loss resulting from State taxation.[6/] In short, there is no basis for the State's claim (Br. 35-36) that the Narragansetts bargained away

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[6/] As noted above, Rhode Island's claim to sovereignty over former Indian lands is based in part on a purported purchase of lands from the Narragansetts in 1880, nearly 100 years after enactment of the Trade and Intercourse Acts nullifying any such purchases made without federal approval.

their sovereignty when they settled their aboriginal title claims.

C. The Alaska Native Claims Settlement Act does not provide a paradigm for Interpreting the Rhode Island Indian Claims Settlement Act.

The State advances a new theory on appeal (Br. 40), to the effect that the Settlement Act is closely akin to the Alaska Native Claims Settlement Act (ANCSA), by virtue of its "comprehensive" scope and Congressional intent. It argues that the Settlement Act is part of a "movement" begun by ANCSA away from "paternalistic federal oversight," and therefore that ANCSA, and not the Connecticut Settlement Act, 25 U.S.C. 1601, addressed in Blumenthal, supra, 228 F.3d 82, should guide the interpretation of the Settlement Act as it affects the Secretary's authority to take lands into trust for the Tribe. Assuming *arguendo* that this new theory may be considered for the first time on appeal (see Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1062)), it is without merit. The similarities the State finds between ANCSA and the Settlement Act are superficial at best, and in any event, nothing in ANCSA supports the State's view that the Housing Lands at issue here may not be taken into trust by the United States.

Unlike ANCSA, the Settlement Act is implementing legislation whose content was determined by the parties to an agreement to settle aboriginal title claims. The Settlement Act closely tracks the language of the JMOU. And the Settlement Act did not, as the State urges (Br. 46), alter the Narragansetts' relationship to the federal government. Both before and after the Settlement Act, the Narragansetts were unrecognized, ineligible for federal benefits, and subject to state law. Before the Settlement Act, they were also landless. The Settlement Act therefore did not "sever them from their land" (see Br. 40), but rather restored to the Narragansetts a portion of their historical land base and established that, in the

event of the Tribe's acknowledgment, those lands would be protected by the federal government. 25 U.S.C. 1707(c).

Whereas ANCSA ended federal superintendence over most Indian lands in Alaska, the Settlement Act restored lands to the Narragansetts that would be federally protected in the event of their acknowledgment. No intent to limit the Secretary's authority to invoke Section 5 of the IRA is expressed in the language or history of the Settlement Act. Instead, the purpose of the statute was to resolve clouds on the titles to privately held lands in Rhode Island whose validity was subject to question because of the Narragansetts' lawsuits, by granting lands to the Indians in exchange for extinguishment of their aboriginal title claims. See, e.g. 25 U.S.C. 1701; H.R. REP. 95-1453, at 5, 95th Cong. 2d Sess. (1978) (purpose of Settlement Act is to implement settlement agreement regarding Tribe's aboriginal title claim).[7/]

The creation of a corporation to manage the Narragansetts' Settlement Lands bears only the most tangential resemblance to the establishment of Native Corporations by ANCSA. ANCSA eliminated virtually all reservations in Alaska and transferred both funds and land without restraints on alienation to business corporations wholly owned by Alaska Natives that were to be formed pursuant to ANCSA. The Narragansetts, on the other hand, had been organized as a state-

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[7/] Contrary to the State's claims (Br. 47), the Connecticut and Rhode Island settlement statutes share a common purpose. Both were intended to resolve land disputes arising from Indian aboriginal title claims. In fact, the Rhode Island Settlement Act likely served as a model for the Connecticut Settlement Act. See H. REP. No. 95-1453, at 1951 (1978), reprinted in 1978 U.S.C.C.A.N. 1948, ("The committee is convinced that this legislation will serve as a landmark for the resolution of other land claims by eastern tribes under the Trade and Intercourse Act.").

chartered nonbusiness corporation for decades before the Settlement Act. In contrast to ANCSA, the Settlement Act placed the management of the Narragansetts' land in the hands of a separate corporation created exclusively to manage the lands. The board of the new corporation included both Indian and state representatives while the Tribe remained unrecognized, and the statute provided for federal protection of the lands in the event that the Tribe was acknowledged. 25 U.S.C. 1707(c). Shortly after the Tribe's acknowledgment, the corporation was dissolved and the Secretary accepted the Settlement Lands in trust for the Tribe. Thus, the Settlement Act facilitated the return to, rather than the elimination of, federal superintendence of the Narragansetts' lands.

Finally, the State is mistaken in believing that Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998), assists its case. Venetie held merely that certain lands held in fee by Alaska Natives were not "Indian country." No issue of the United States' authority to take lands into trust was addressed in Venetie, which accordingly is of no assistance to the State in its assertion that fee lands held by the Tribe may not be taken into trust by the Secretary pursuant to Section 5 of the IRA.

III

LAND OWNED BY THE NARRAGANSETT TRIBE MAY BE TAKEN INTO TRUST FOR THE TRIBE WITHOUT OFFENDING THE UNITED STATES CONSTITUTION

The State urges various legal theories to the effect that its sovereignty would be unconstitutionally diminished if the Housing Lands were taken into trust for the benefit of the Tribe. The State's arguments are unsupported and were properly rejected by the district court.

A. Section 5 of the IRA Does Not Constitute an Unconstitutional Delegation of Congressional powers.

Article I, Section I, of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The State contends (Br. 72-76) that Section 5 of the IRA constitutes an unconstitutional delegation of legislative power. The Supreme Court has repeatedly held that when Congress confers decision making authority upon agencies it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) (citations omitted). The State and its *amici* contend (Br. 73; Amicus Br. 13-15) that Section 5 lacks the required "intelligible principle."

The authority to acquire lands for Indians in Section 5 is one of many provisions the IRA enacted to revitalize tribal economic and political self-determination. The IRA contains numerous provisions protecting Indian lands to effectuate this policy objective, including cessation of further allotment of Indian lands, 25 U.S.C. 461, indefinite extension of the restriction on existing Indian trust lands, 25 U.S.C. 462, and restoration of remaining surplus lands on reservations to tribal ownership, 25 U.S.C. 463. The statute's delegation to the Secretary of

authority to acquire lands for Indians, and to hold lands in trust to protect against future loss, is another such provision. See Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir.), cert. denied, 439 U.S. 965 (1978) ("[b]ecause many Indians who were unable to manage their allotted lands had sold them or had them sold at a tax sale, . . . immunity from property taxes was an important means of halting further loss of Indian land"). The Secretary's authority to acquire lands pursuant to Section 5 accordingly is neither "standardless" nor "unrestrained," but instead is limited by the policy goals of promoting and restoring Indian economic and political self-determination.

The State relies, for the proposition that Section 5 offends the non-delegation doctrine, on a vacated decision, South Dakota v. United States Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996).[8/] Because the decision in South Dakota was vacated by the Supreme Court, it is a nullity without precedential value. See Lovelace v. Southeastern Massachusetts University, 793 F.2d 419, 422 (1st Cir. 1986). Currently, the leading case on the delegation question is United States v. Roberts, 185 F.3d 1125, 1136-38 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000), in which the Tenth Circuit rejected the analysis in South Dakota and found that Section 5 provides sufficient standards for the Secretary's exercise of discretion. Id. at 1136-37. See also Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688 (9th Cir.1997) (Congress has given guidelines to the Secretary regarding when land can be taken in trust); City of Roseville, 219 F. Supp.2d 150, 156, aff'd, 348 F.3d 1020 (D.C.

[8/] The State also relies on State of Florida, Dept. of Bus. Reg. v. United States Dep't of Interior, 768 F.2d 1248 (11th Cir. 1985), but admits (Br. 75, n.37) that no non-delegation challenge was presented in that case.

Cir. 2003), cert. denied, __ S.Ct. __, 2004 WL 297021 (April 5, 2004) (limitations on Secretary's trust acquisition authority more than sufficient to provide the requisite "intelligible principles"); City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 473 (D. D.C. 1978) (Section 5 not unconstitutional delegation of legislative authority); City of Lincoln City v. United States Dep't of Interior, 229 F. Supp.2d 1109, 1128 (D. Or. April 17, 2001) (same); Shivwits Band of Paiute Indians v. Utah, No. 95C-1025C (D. Utah, March 21, 2001) (same).

The vast weight of authority, both before and since the vacated decision in South Dakota, holds that Section 5 does not offend the non-delegation doctrine. The Supreme Court's most recent guidance on the non-delegation doctrine does nothing to undermine this authority. In Whitman v. American Trucking Ass'ns, Inc., 531 U.S. at 472, the Court reversed the court of appeals' determination that the Clean Air Act as interpreted by EPA lacked the requisite "intelligible principles" in its delegation of authority to set air quality standards because it "lacked determinate criteria for drawing lines." Id. In reversing this holding, the Court explained that it frequently had recognized Congress's authority to defer the setting of specific standards to an agency. See id. at 474-75 (collecting cases). The Court noted that it had found an "intelligible principle" in statutes authorizing regulation "in the public interest," and that in only two statutes had it ever found the requisite "intelligible principle" lacking, id. at 474. "In short, [the Court has] almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." Id. The district court correctly concluded, therefore, that Section 5 contains adequate limits on the Secretary's exercise of discretion and does not offend the non-delegation doctrine. 290 F. Supp. 2d at 187.

B. Trust acquisition of the Housing Lands would not unconstitutionally diminish Rhode Island's territorial sovereignty.

The State and its *amici* contend (Br. 61; Amicus Br. 21) that the United States may not acquire lands to be held in trust for the benefit of an Indian tribe unless it has secured the consent of the State pursuant to the Enclave Clause, art. I, sec. 8, cl. 17 of the Constitution. The State reasons that "[p]rimary federal jurisdiction through federal superintendence over the land by virtue of the application of the trust under § 465 and § 1151 jurisdiction, coupled with Congress's exclusive legislative authority 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 [Housing Lands]." Id.

The State contends that such exclusive legislative authority may not be asserted without State consent under the Enclave Clause. Land held in trust for tribes, however, is not equivalent to a federal enclave, and federal law does not apply exclusively on such lands. Tribal trust lands unquestionably are subject to state law, albeit not without limitations. See Nevada v. Hicks, 533 U.S. 353, 361 (2001).

The Enclave Clause, which excludes state jurisdiction over land acquired for "the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," U.S. Const. art. I, § 8, cl. 17, was intended to ensure that the 'places on which the security of the entire Union may depend' would not 'be in any degree dependent on a particular member of it.' Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 530 (1885) (quoting Justice Story, 2 Constitution § 1219). The Enclave Clause applies where the United States assumes "exclusive legislative authority"

over land "so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory." Silas Mason Co. v. Tax Common of Wash., 302 U.S. 186, 197 (1937). The United States may not assume such exclusive authority without the consent of the State in which the land is located. Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).

Indian reservations, however, are not federal enclaves, and instead represent land owned by the United States for public purposes. "Such ownership and use without more do not withdraw the lands from the jurisdiction of the State" and consent is not required. Id . As the Supreme Court explained in Surplus Trading Co.,

> A typical illustration is found in the usual Indian reservation set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save they can have only restricted application to Indian wards.

Surplus Trading, 281 U.S. at 651.[9/]

The Supreme Court recently confirmed that lands held in trust for the benefit of tribes are not subject to the exclusive jurisdiction of the United States:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though

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[9/] To be sure, the relationships among federal, Indian, and state sovereignty within the boundaries of an Indian reservation are more complex than this simplified description suggests. See Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001); Montana v. United States, 450 U.S. 544 (1981). The Court nonetheless has made clear that the consent and exclusive jurisdiction requirements of the Enclave Clause do not apply where the United States holds title to lands in trust for the benefit of tribes.

> tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.

Nevada v. Hicks, supra, 533 U.S. at 361.

States have no regulatory authority over land subject to federal enclave jurisdiction unless it is expressly provided by Congress. Paul v. United States, 371 U.S. 245, 263 (1963) (grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action). State regulation on Indian trust lands, on the other hand, is curtailed only to the extent that it conflicts with federal legislation designed to promote the welfare of Indians. See United States v. McGowan, 302 U.S. 535, 539 (1938) ("The Federal Government does not assert exclusive jurisdiction within the [reservation]. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the [reservation], of such state laws as conflict with the federal enactments"); see also Cabazon Band, 480 U.S. 202, 216 (1987) (State sovereign authority is curtailed in Indian country where "'it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'") (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)) .

The district court correctly concluded that, because such an action does not result in a complete ouster of state jurisdiction, "the acceptance of land into trust for the benefit of an Indian tribe does not amount to the creation of a federal enclave. Therefore, the Secretary's acceptance of the parcel into trust for the benefit of the Narragansetts does not amount to a violation of the Enclave Clause." 290 F. Supp.2d at 188, citing City of Roseville v. Norton, supra, 219 F. Supp.2d at

150, 152.

C. Trust Acquisition of the Housing Lands Does Not Offend the Admissions Clause

Rhode Island further asks this Court (Br. 69-71) to conclude that Indian tribes "possess[ing] attributes of sovereignty" constitute a "state in the broadest sense." The State contends that taking the Housing Lands into trust therefore offends the Constitution (U.S. Const. art IV, § 3, cl. 1, the "Admissions Clause") by allowing the Tribe's exercise of territorial sovereignty within an existing state. The Admissions Clause was intended to "quiet the jealousy" of states by assuring them that they would be neither partitioned nor combined in order to create new states to be admitted to the Union. The Federalist No. 43 (James Madison). The State contends (Br. 69-70) that Indian tribes living on land held in trust by the federal government within an existing state are the equivalent of new states – or at least new territories – formed at the expense of existing states in violation of the Constitution.

As the district court correctly concluded, the State reads too broadly what constitutes a "new state." It correctly concluded that "state," as used in the Admissions Clause, refers to a body *equal* in power to the existing states. 290 F. Supp. 2d at 189, citing Coyle v. Smith, 221 U.S. 559, 566-67(1911). In Coyle, the Supreme Court held that the power to admit "[n]ew States * * * into this Union" conferred on Congress in Article IV, Section 3, allows the inclusion of new entities in the "Union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself," Coyle, 221 U.S. at 567, but does not confer power to admit to that Union "political organizations which are less or greater, or different in dignity

or power, from those political entities which constitute the Union.'" Id. at 566.

The district court correctly rejected the State's Admissions Clause challenge, concluding that "there can be no serious dispute that trust acquisition does not confer statehood status." 290 F. Supp. 2d at 189, citing City of Roseville, supra, 219 F. Supp.2d at 153; (trust acquisition for tribe "in no way creates an entity equal to the State * * * or to the other states in the union"); see also White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (noting that "[t]ribal reservations are not States").

Finally, the State and its *amici* contend that Section 5 of the IRA offends the Tenth Amendment by generally encroaching on State sovereignty. Because regulation of Indian affairs is clearly within the enumerated powers of the federal government, this argument is unfounded. The IRA does not impermissibly require action by states or impede a state government's responsibility to represent and be accountable to the citizens of the State. Instead, it is a manifestation of Congress's constitutional authority to regulate matters directly and to pre-empt contrary state regulation. It is fully consistent with the Tenth Amendment. See New York v. United States, 505 U.S. 144, 178 (1992).

The State incorrectly argues (Br. 58) that Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) establishes the broad proposition that Congress lacks "the authority under its article I Indian Commerce Clause power to diminish state sovereignty." In Seminole Tribe 517 U.S. at 65-66, the Court reasoned that because the Eleventh Amendment post-dates assignment to Congress of the powers enumerated in Article I, those powers (including the Indian Commerce Clause) cannot be used to abrogate the states' Eleventh Amendment immunity. Rhode Island here relies on the Tenth Amendment, which also post-dates Article I. But,

as the State recognizes (Br. 63), the Supreme Court in New York has interpreted the Tenth Amendment to mirror the doctrine of enumerated powers that Article I embodies. Applying the reasoning of Seminole to the Tenth Amendment therefore merely states the obvious: As the Supreme Court said in United States v. Darby, 312 U.S. 100, 124 (1941), "[i]t is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" Nothing in authorities relied on by the state establishes that Congress lacks the Article I Indian Commerce Clause power to affect state sovereignty by taking land into trust for federally recognized Indian tribes.

IV

THE SECRETARY'S APPROVAL OF THE TRIBE'S TRUST APPLICATION WAS REASONABLE, THOROUGHLY SUPPORTED BY THE ADMINISTRATIVE RECORD AND CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT

On appeal, the State reasserts each of its many challenges to the Secretary's decision making process: that BIA 1) failed to comply with its own trust acquisition regulations, 25 C.F.R. Part 151; 2) failed to comply NEPA and IGRA and related regulations; 3) abused its discretion by failing to cause a federal consistency review pursuant to the CZMA to be conducted prior to accepting the parcel into trust; and 4) failed to consider that the Tribe and the town had not executed a local cooperation agreement under the Native American Housing Assistance and Self-Determination Act ("NAHASDA"). To the contrary, the Secretary's decision to accept the Housing Lands into trust to provide low-income housing for elderly tribal members is amply supported by applicable law and the administrative record, as the district court correctly concluded. 290 F.Supp.2d at 173-79.

A. Standard of Review.

The Secretary's decision to accept a 31-acre parcel in trust for housing purposes was rendered after a full adjudicatory proceeding before the Interior Board of Indian Appeals (IBIA). Section 706(2)(A) of the APA provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." This standard encompasses a presumption in favor of the validity of agency action. Massachusetts v. Andrus, 594 F.2d 872, 888 (1st Cir. 1979) (so long as the Secretary's determinations are within the law, are based upon consideration of relevant factors, and do not involve clear errors of judgment, a court may not substitute its view); Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1992) (instructing that "the court must presume the agency action to be valid"). The State has not met its burden to show that the Secretary made a clear error of judgment under the "highly deferential" review standards of the APA. The decision at issue here is thoroughly grounded in the relevant law and regulations, and therefore was properly affirmed by the district court.

B. BIA properly applied the Part 151 factors

The regulations governing the Bureau's acceptance of lands into trust for individual Indians and Indian tribes are found at 25 C.F.R. Part 151. Central to the State's APA challenge is the assertion that conversion of the Housing Lands to trust would represent an "unprecedented defeasance of the laws and jurisdiction of the State and Town" (Br. 79). The creation of a jurisdictional regime pertaining to the Tribe's Housing Lands that differs from the regime existing on its Settlement Lands is simply a fact of coexisting federal, state and tribal land jurisdiction. As the Second Circuit observed in Blumenthal "the possibility of heterogeneous

jurisdictional areas within the [tribe's] lands does not compel a different result." 228 F.3d at 91 (citing Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 502 (1979) ("checkerboard jurisdiction is not novel in Indian law")). The district court correctly concluded that BIA complied with the pertinent regulations and made a reasoned decision supported by the administrative record.

1. BIA's consideration of the relevant factors was independent and searching

The district court found that BIA's decision to accept the Housing Lands into trust was based upon its own independent analysis and evaluation of the 1997 application. 290 F.Supp. 2d at 175. The State asserts (Br. 80) that a staff-level memorandum recommending approval of the Tribe's application (App. 8) exemplifies the BIA's "arbitrary and capricious conduct." Although the State suggests no defect in the analysis contained in the memorandum, it argues (Br. 81) that this document evidences that the BIA "entirely failed" to consider events relevant to the Tribe's application that occurred between 1993 and 1997. The State is incorrect.

The State highlights (Br. 81) the Narragansett Indian Tribe v. Narragansett Electric Co., litigation, supra, 89 F.3d 908, and the State's comments to BIA on the proposed trust acquisition (App. Tab 3), as matters BIA purportedly ignored. The administrative record shows, however, that between 1993 and 1997, BIA, inter alia, required the Tribe to supplement its initial Environmental Assessment ("EA") (App. Tab 17); conducted an environmental hazard survey of the subject 31-acre parcel (AR Vol. II, Tab A (Supp. App. 99); required confirmation of consistency with the State's Coastal Resources Management Plan ("CRMP") (AR Vol. II, Tab C, Ex. 10-11 (Supp. App. 102-03)); was well aware of the Narragansett Electric

litigation (AR Vol. I, Tabs 1–2, 4-5, 7, 9-14 (Supp. App. 10-12,13-93); was apprised of, and offered to facilitate, negotiations between the Tribe, the Town, and the State concerning both environmental and jurisdictional issues attendant to the Tribe's development of the parcel (AR Vol. I, Tab J (Supp. App. 1)); and specifically requested that the Regional Solicitor address several legal and jurisdictional issues raised by the State in its comments to the BIA on the Tribe's trust application (AR Vol. II, Tab K (Supp. App. 101).

In short, BIA officials evaluated the Tribe's original 1993, and subsequent 1997, trust applications, together with many other documents and issues in connection with these applications. BIA's realty specialist determined after his own and others' evaluations of all of the relevant materials – at least with respect to the non-environmental Part 151 factors – that he could not improve upon the Tribe's articulation of how its application satisfied the regulatory factors. He therefore incorporated the Tribe's language in large measure into the BIA staff recommendation. The State's assertion that this demonstrates that the BIA did not consider events between 1993 and 1997 is clearly refuted by the administrative record, as the district court correctly concluded. 290 F. Supp.2d at 175 (State's objections are "belied by the administrative record"). The district court therefore correctly determined that BIA's determination was based upon its own independent analysis and evaluation of the 1997 application. Id.

2. BIA considered the Tribe's need for the Housing Lands.

The regulations at 25 C.F.R. 151.10 and 25 C.F.R. 151.11 address the criteria for consideration in processing on-reservation and off-reservation

acquisitions.[10/] The administrative record shows that BIA fully considered the criteria governing trust acquisitions outlined in the regulations. More specifically, BIA considered the Tribe's need for additional lands, 25 C.F.R. 151.10(b), and the potential jurisdictional problems and land use conflicts that might arise from accepting the lands into trust status, 25 C.F.R. 151.10(f).

The State criticizes (Br. 82) BIA's assessment of the Tribe's need for land on grounds that the BIA considered the Tribe's need for the land and for housing, rather than its need for the benefits flowing from trust status. The State misinterprets the regulation, 25 C.F.R. 151.10(b), and the BIA's analysis of the Tribe's application for trust acquisition of the land. The IRA authorizes the Secretary to place lands in trust to meet the Tribe's needs to support tribal self-sufficiency and economic development or other appropriate goals. The record here is replete with references to the Tribe's need for this parcel for low income and elderly housing for its members (App. Tabs 5 at 5;12; 8 at 2; 16). HUD's decision to fund the purchase and initial development of the parcel for low income housing also rested on its determination of the need to remedy the shortage of safe and sanitary housing for low income tribal members. See Town of Charlestown v. E. Area Director, BIA, 35 IBIA 93, 95 (2000). As one HUD official explained, "lands authorized under the Indian housing program and funded by this agency for purchase by any housing authority is done so with *very specific justification of need*." (AR Vol. I, Tab 3) (Supp. App. 13) (emphasis added)). See also

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[10/] The State is wrong when it asserts (Br. 79) that neither section, 151.10 and 151.11 applies to this trust acquisition. BIA processed this application as an off-reservation acquisition and applied all of the pertinent regulations to the application. Accordingly, BIA made no finding made concerning contiguity of the lands to the Settlement Lands.

Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 878 F. IBIA. 349, 356 (D.R.I. 1995) (" need recognized by HUD and the Tribe"). Clearly, the administrative record is based on far more than the Tribe's representations on this factor. Indian housing is one of the specific purposes for which the Secretary acquires lands in trust for tribes, 25 C.F.R. 151.3(a)(3), and the administrative record fully IBIAorts the Secretary's decision that the Housing Lands were needed.

3. BIA was not required to speculate on the impact of removal from the tax rolls of a non-existent housing development.

The regulations require that the Secretary consider the impact on the State and its political subdivisions from the removal of the land from the tax rolls. 25 C.F.R. 151.10(e). The State asserts (Br. 83) that BIA abused its discretion by evaluating the impact of removing the undeveloped parcel from the tax rolls, because houses could have been placed on the lands, which might have increased State and local property tax revenues. The State offers no authority for this assertion. The BIA interprets its regulation to require an assessment of removing the property from the tax rolls as the property exists, and not on the basis of hypothetical uses that might generate tax income. See Rio Arriba v. Acting Southwest Regional Director, 36 IBIA 14 at 24-26 (IBIA 2000). See also City of Lincoln City v. U.S., 229 F. IBIA. 2d 1109, 1125 (D. Or. 2001)(rejecting City's suggestion that the BIA be required to "speculate about revenues [a proposed trust property] might have generated for the City" under a prior non-tribal development scheme and then "compare these hypothetical revenues to equally hypothetical losses that might result from a fee-to-trust transfer"). The consideration of taxes actually paid is clearly reasonable, particularly where an assessment of the impact of removing a theoretical housing development from the tax rolls would amount to

little more than speculation. An agency's reasonable interpretation of its own regulations is entitled to controlling weight. Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

4. BIA gave sufficient consideration to jurisdictional issues.

The regulations also require that the Secretary consider jurisdictional problems and potential conflicts of land use that may arise with the trust acquisition. 25 C.F.R. 151.10(f). The State asserts (Br. 83) that the Secretary "completely ignored the complex jurisdictional issues arising from taking the parcel into trust." To the contrary, the administrative record contains a detailed analysis of the jurisdictional issues that may arise on the Housing Lands, if they were transferred into trust (App. Tab 8 at 3).

In November 1997, the Regional Solicitor, Southeast Region, opined, inter alia, that the Bureau has no authority to subject the parcel to the civil and criminal jurisdiction of Rhode Island (AR Vol. II, Tab K, p. 2 (Supp. App. 110)). Specifically, the Regional Solicitor explained that, contrary to the State's suggestion, 25 C.F.R. 1.4(b) "does not purport to effect changes in the fundamental jurisdictional status of the Indian land" and that the Bureau "may not presume to make Indian land subject to state civil and criminal jurisdiction," a "prerogative that has been reserved to Congress, [which] may not be usurped administratively." Id. (citing 25 U.S.C. 1321 et seq. (granting consent of the United States to the states to assert criminal and civil jurisdiction over Indian lands upon the consent of the affected tribe); Kennerly v. District Court of Montana, 400 U.S. 423, 424 n. 1 (1971) (holding that a tribe may not grant civil jurisdiction to a state absent congressional authorization)). Contrary to the State's assertions, the record reveals a detailed analysis of the potential jurisdictional issues attendant to the trust

acquisition.

C. No cooperative agreement is required by the Part 151 regulations.

At the time of BIA's original decision, the NAHASDA required execution of a local cooperation agreement between the Tribe and the municipality in which the housing was situated as a condition of housing grants. See 25 U.S.C. 4111(c)), as amended through Pub. L. 105-276 (Oct. 21, 1998). No such agreement was executed between the Tribe and the town concerning the parcel. The State contends that BIA abused its discretion by failing to require a local cooperation agreement.

The district court found this argument unpersuasive for "at least two reasons." 290 F. Supp.2d at 178. First, 25 U.S.C. 4111(c)) establishes a prerequisite to HUD's award of housing grants. It does not pertain to BIA's trust acquisition authority. Second, section 4111(c) has been amended to permit HUD to waive the cooperation agreement requirement, 25 U.S.C. 4111(c), as amended, Pub. L. 106-569, Dec. 27, 2000, and the Tribe has obtained such a waiver. Although the State apparently disagrees (Br. 84) with the district court's reliance on the purported waiver of this requirement, it offers no explanation for its claim that BIA's decision is invalid in the absence of an agreement required only as a prerequisite for a HUD grant. Nothing in the Part 151 regulations requires the Tribe to acquire HUD funding in the first instance. Because the agreement is not required by the IRA and there is no indication on the record that the lack of the agreement will in fact impair the Tribe's development of the land for housing, this claim was properly rejected.

D. BIA fulfilled its responsibilities under NEPA

The district court correctly rejected the State's assertion (Br. 87) that the

Secretary must prepare an Environmental Impact Statement ("EIS") before issuing a decision to transfer this parcel into trust. 290 F.Supp. 2d 176. The BIA fully complied with the National Environmental Policy Act ("NEPA") and its implementing regulations in reaching its decision to accept the Housing Lands into trust.

The Bureau was not required to prepare an EIS in the absence of a finding that the proposed action would significantly affect the quality of the human environment. 42 U.S.C. 4332(2)(c)). The Environmental Assessment submitted by the Tribe in conjunction with its trust application served as the starting point for BIA's assessment of the significance of the environmental impacts associated with the Tribe's trust application as is contemplated by 40 C.F.R. 1506.5(b)[11/] See App. Tab 13 at 19).

The State asserts (Br. 87) that BIA merely accepted the findings and supporting representations made by the tribal applicant here, relying on a handwritten note attached to the Tribe's initial EA. Although the note characterizes the document as "not much of an EA," it is not, as the State implies, evidence that BIA accepted the Tribe's conclusions based on a deficient document. The note further reads: "Need more information on archeological sites (3) and measures to protect them. Need letter from US F&WL [Fish and Wildlife] Service on presence of Endangered Species or their critical habitat" (App. Tab 22); see also AR Vol. I, Tab S (Supp. App. 3) (letter informing the Tribe of these additional

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[11/] The regularity of the Bureau's NEPA process here is confirmed by the BIA's NEPA Handbook: "When the proposed Bureau action is a response to an externally initiated proposal . . . . the applicant will normally be required to prepare the EA, if one is required, and to provide supporting information and analyses as appropriate." NEPA Handbook at 4.2 B ("Externally Initiated Proposals").

requirements). The administrative record also shows that BIA found the Tribe's EA deficient for lack of "certification from the state that the proposed land use is in compliance with the State Coastal Zone Management Plan."[12/] (App. 5 at Ex. 10). BIA ensured that the requisite supplemental information was provided before completing its analysis and issuing a Finding of No Significant Impact ("FONSI") (AR Vol. I, Tab U (Supp. App. 4) (species and habitat information); AR Vol. I, Tab V & W (Supp. App. 5-9) (archeological information); App. Tab 5 Exs. 10-11 (coastal zone information); App. Tab 21 (FONSI)). In June 1997, BIA also independently conducted a hazardous substances survey of the Housing Lands. AR Vol. II, Tab A. With issuance of the FONSI, BIA satisfied its NEPA responsibilities. 40 C.F.R. § 1501.4(e).

The State's claim (Br. 89) that the decision was defective in the absence of consultation or hearings also is unfounded. The regulations require that BIA notify State and local governments of its receipt of a tribal request to have lands taken into trust and of their opportunity to provide written comments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. 151.11(d) (AR Vol. II, Tab E (Supp. App. 105).[13/] There is no requirement that a hearing or consultation be held when BIA is considering accepting lands into trust.

[12/] The Area Director requested that this certification be obtained in light of this Court's order the previous year that the Tribe satisfy the "applicable requirements of Rhode Island's Coastal Resources Management Program." Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. 349, 366 (D. R.I. 1995).

[13/] The fact that BIA apparently sent this notice only to the Town is harmless error. The State exercised its opportunity to submit comments on the Tribe's application, and those comments were thoroughly considered by the Bureau. AR Vol. II, Tabs I, K, & L (Supp. App. 107-114).

E. BIA complied with the CZMA in making its decision.

The State incorrectly claims (Br. 90) that BIA failed to follow the Federal Consistency Review procedures outlined by the Coastal Zone Management Act ("CZMA") and the Rhode Island Coastal Resources Management Program ("CRMP"), asserting that BIA should have sought Federal Consistency Review of the Tribe's proposed "50-unit housing development."[14/] But the housing development was proposed, approved, and commenced by the Tribe, in conjunction with HUD (a separate agency), *prior to* the Tribe's application to the BIA to take the land into trust. Moreover, the BIA had been informed by the Tribe, the State's Coastal Resources Management Council ("CRMC"), and the district court's opinion in Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. at 366, that the Tribe would be addressing the potential effects of the housing development with the CRMC and would not be allowed to proceed with its housing development until all CRMP requirements had been met.[15/] In other

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[14/] The State incorrectly argues (Br. 89) that the Secretary failed to seek an environmental determination by the State's Coastal Resource Management Council ("CRMC") for a proposed fifty-unit housing development, which, they contend (Br. 88), is "five times the density" previously approved by the CRMC and in violation of a zoning ordinance that "sets the zoning density at two acres per lot." Contrary to the State's assertions, no independent determination was required. The record demonstrates that the Tribe has reduced the number of units planned from 50 to 12. Moreover, the density requirement applied to a subdivision proposed by the Housing Lands' prior owner. As the Town explained in 1997, the Tribe "discontinued the subdivision scheme and reconsolidated the area as one lot of approximately 30 acres" (AR Vol. I, Tab 15 (Supp. App. 99)). It has received approvals from both the CRMC and the Town of Charlestown. In other words, the "independent review" demanded by the State would have been meaningless, and any claim on this issue is in any event moot.

[15/] The BIA notified the Tribe in 1996 of its awareness of the Tribe's responsibility (continued...)

words, BIA understood that any potential effects previously brought about by the housing plan were being addressed by the Tribe and the CRMC, and that therefore, any BIA consultations with CRMC in this regard would be redundant.

BIA had no reason to believe that approving the trust application would affect any coastal use or resource, and thus was not required to file a consistency determination with CRMC. BIA's compliance with the CRMP is further supported by a 1997 letter from CRMC stating that the Tribe's "application for trust status is consistent with the RICRMP" (App. Tab 5 at Ex. 11). In any event, the Tribe has since received the necessary assent from the CRMC for its housing activities. See Knaust v. City of Kingston, New York, 1999 WL 31106, at *7 (N.D.N.Y. Jan. 15, 1999) (CZMA claim moot due to state approval of project granted after federal agency decision); Northwest Envtl. Def. Ctr. v. Brennen, 958 F.2d 930, 937 (9th Cir. 1992) (CZMA claim denied where purported procedural violations resulted in no injury to plaintiffs).

F. BIA had no obligation to consider IGRA-Related issues here.

The Secretary is under no obligation to engage in analysis of hypothetical uses not set forth in a tribal trust application. The State asserts that the Secretary abused her discretion in failing to engage in an Indian Gaming Regulatory Act ("IGRA") analysis of the Tribe's trust application (Br. 91). The district court also found that "there was no evidence that the tribe intended to use the parcel for other than tribal housing . . . [and] the tribe reaffirmed that it intended to use the parcel for a housing development and stated that it had 'no immediate plans for any further future development'" and the determination that the lands were to be used

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[15/](...continued)
and its "understanding that the tribe is currently working with the state to secure documentation of this compliance." (App. 5 at Ex. 10).

for housing purposes "was amply supported in the record." 290 F. Supp. 2d at 178 (emphasis added). This conclusion is fully consistent with IBIA precedent, contrary to the State's claim (Br. 91). The State relies on a case in which the IBIA remanded a fee-to-trust determination for further analysis of the purpose of the acquisition. In that case, however, the parcel was donated by a corporation with a gaming relationship with the Mescalero Tribe, was contiguous to the Tribe's ongoing gaming operation, and a hotel located on the parcel was shuttling patrons to the Tribe's casino. Village of Ruidoso v. Albuquerque A. Dir. BIA, 32 IBIA 130 (1998). Here, the land was purchased with HUD monies to build low-income housing for elderly tribal members, the Tribe does not operate any gaming facilities, and the record shows that it has reaffirmed that its only intended use of the land was for housing (App. Tab 14). The district court properly found that the Secretary was not required to conduct an analysis of a hypothetical casino. 290 F.Supp.2d at 178.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. Rule 32(a)(7) that the attached brief for the federal appellees is proportionately spaced, has a typeface of 14 points or more, and contains 13,700 words, as counted by WordPerfect 9.0.

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