IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 03-2647

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.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of the Interior
FRANKLIN KEEL, in his capacity as Regional 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

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES ON REHEARING *EN BANC*

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INTRODUCTION

By order dated January 16, 2007, the Court invited the parties to submit supplemental briefs with "further information" on the question "whether--as the Secretary contends--administrative practice supports the Secretary's interpretation of the Indian Reservation [sic] Act to permit trusteeing of land of a tribe not recognized at the time that the statute was enacted (and not eligible under one of the other

provisions of that statute or separate legislation)." This supplemental brief is provided by the federal appellees pursuant to that invitation.

In this appeal, the State appellants ("State") seek to prevent the Secretary of the Interior ("Secretary") from accepting legal title to 32 acres of land, which are to be held in trust for the Narragansett Indian Tribe pursuant to Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465. The State argues that the Secretary lacks statutory authority to take the land in trust for the Tribe, on the ground that the IRA authorizes the Secretary to accept lands in trust only for tribes that were both "federally recognized" and "under federal jurisdiction" on June 18, 1934. The State has further suggested (Petition for Rehearing at 14; 8/23/05 Br. at 8-13) that the Secretary himself historically interpreted the statute to prohibit trust acquisition of land for the benefit of tribes that were not recognized when the IRA was enacted in 1934. This is not correct. The Secretary, pursuant to the regulations, has consistently acquired land in trust for "tribes," defined to include "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, * * * which is recognized by the Secretary as eligible for the special programs and services the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). This Court should not substitute the State's narrow interpretation of section 5 of the IRA and should instead defer to the Secretary's longstanding interpretation, which is reflected in the regulations. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)

The IRA defines "tribe," to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. The Secretary currently treats, and historically has treated, all groups that fall within the statutory definition

of "tribe" as eligible for land acquisition pursuant to section 5 of the IRA, 25 U.S.C. § 465. Section 5 authorizes the acquisition of land "for the purpose of providing land for Indians" and states that title to land so 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." The State asserts that the statute does not authorize trust land acquisition for "tribes" as defined by Interior in the regulations, because the definition of the related term "Indian" in 25 U.S.C. § 479 extends only to "persons of Indian descent who are members of any *recognized* Indian tribe *now under federal jurisdiction*, * * *" (emphasis added). The State contends that this provision mandates that land may not be acquired in trust under the IRA for tribes that were not recognized on June 18, 1934.[1/]

As we have explained (US *En Banc* Supp. Br. 8-11), the Secretary has never adopted the State's view that the Secretary's authority to acquire land under section 5 may be exercised only for the benefit of tribes that were recognized on June 18, 1934, when the statute was enacted. In addition, the terms "recognized" and "now under federal jurisdiction" do not appear in the IRA definition of "tribe," 25 U.S.C. § 479, which instead includes "any Indian tribe" (and see n.7, *infra*). The Secretary

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[1/] Although in some contexts the term "now" in a statute may refer to the date of enactment, Black's Law Dictionary (5th ed.) notes that it may also mean the time at which something is done or the provision is invoked. Moreover, in some contexts, the common law consistently interprets "now" in this later sense, as the date of invocation, not the date of drafting or enactment. See 80 Am. Jur. 2d Wills § 1033; see also 80 Am. Jur. 2d Wills § 1165 ("the modern rule [is] that property acquired by the testator after he executes his will * * * will pass thereunder in the absence of a contrary intention").

accordingly interprets section 5 broadly as authority to take land into trust for all recognized tribes, and not only for tribes that were recognized in June of 1934. This construction of the statute is consistent with the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The State has presented no evidence to support its theory that the Secretary previously interpreted the statute more narrowly. Instead, the State argues (see Petition for Rehearing at 14-15) that the Secretary's actions are consistent with the State's narrow interpretation of section 5, and that the Secretary has not, in fact, exercised the authority of section 5, except for the benefit of tribes that were recognized in 1934, or where Congress has expressly authorized land acquisition for a particular tribe. The State is incorrect.

The State's assertions of fact regarding the "recognized in 1934" status of many tribes are contrary to express findings by courts and by the Secretary. In addition, we are aware of no instance when Interior interpreted the term "tribe" in the IRA to exclude tribes that were not recognized and under federal jurisdiction in 1934. Finally, amendments to the IRA that were enacted in 1994 require all recognized tribes to be treated equally with respect to the privileges and immunities available to tribes, in the absence of a clear congressional directive to the contrary. These amendments are irreconcilable with the State's interpretation and confirm that the Secretary's interpretation is consistent with Congress's understanding of the scope of section 5. The following supplemental information is submitted to correct the State's inaccurate assertions and to assist the Court in understanding the legal context of the Secretary's challenged decision and the practical implications of the State's

interpretation of the IRA.

1. The United States has taken land in trust pursuant to 25 U.S.C. 465 for tribes that were not recognized in 1934.

The Narragansett Indian Tribe was first federally recognized in 1983, when, pursuant to regulations promulgated by the Secretary, it was acknowledged[2/] as a tribe that had existed continuously since first contact with Europeans. See 48 Fed. Reg. 6177. Attached as Appendix A to this brief are land records reflecting trust acquisitions made by the Secretary pursuant to 25 U.S.C. § 465 on behalf of __ other tribes that were not "federally recognized" in 1934 but have since been acknowledged as tribes by the Secretary, either before 1978, when the acknowledgment regulations were promulgated, or pursuant to the acknowledgment process set out at 25 C.F.R. Part 83.[3/] The State incorrectly asserts (8/23/06 Br. at 8-12) that several of these tribes, including the Grand Traverse Band of Ottowa and Chippewa Indians, the Karuk Tribe, the Stillaquamish Tribe, the Saulte Ste. Marie Tribe of Chippewa

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[2/] Before 1978, the existence of American Indian groups as "tribes" was recognized on an *ad hoc* basis, through treaties, legislation, court decisions, and the provision of services. See Cohen, *Handbook of Federal Indian Law* (2005 ed.) at 140-154. "Acknowledgment" is the term now used to describe the federal government's process for determining that a tribe exists as an entity legally entitled to the privileges, immunities, responsibilities, and obligations of such tribes, and subject to Congress's constitutional authority over Indian tribes (Art. 1, sec.8, cl. 3). Any tribe "acknowledged" by the Secretary is a "recognized tribe" for all statutory purposes.

[3/] These records were located and reproduced by realty officers for four BIA regions, where such records are maintained and where tribal trust land acquisition requests are processed. They do not reflect a comprehensive listing of lands owned by the United States in trust for later-recognized tribes. The most complete such listing of which we are aware is contained in the October, 2006, GAO report attached as Appendix E.

Indians, and the Jamestown S'Klallam Tribe, were "recognized in 1934," based on the existence of statutes or treaties naming them. But "recognized" status at one time in history does not establish that a tribe remains recognized at a later date. See *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) (Steilacoom, Duwamish, Samish, Snohomish, and Snoqualmie Tribes not "recognized tribes," despite treaties with them in the 1850's); *Grand Traverse Band of Ottawa and Chippewa Indians*, 369 F.3d 960, 969 (6th Cir. 2004) ("undisputed facts show that the federal government withdrew the Band's recognition in 1872"); see also *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990) (Indian treaty rights dependent on continuous organized tribal structure).

The Solicitor of the Interior historically has not deemed groups to be "recognized" as tribes for purposes of the IRA on the basis of prior federal recognition alone. Significantly, Interior required that groups seeking to reorganize under the IRA be functioning as tribes at the time of application to reorganize, and that they provide other indicia that they had maintained their existence as tribes. See Cohen, *Handbook of Federal Indian Law*, (1942 ed.) at 271-272; (2005 ed.) at 149-152;1 Sol. Op. on Indian Affairs 864 (1938) (questioning whether particular treaty tribes continued to be considered "recognized tribes"). Significantly, the IRA explicitly authorized the recognition of tribes that were first organized pursuant to its provisions, and therefore could not have been recognized on June 18, 1934, by defining "the Indians resident on one reservation" as tribes. 25 U.S.C. § 479; Cohen (2005 ed.) at 151 .

We are not aware of any document listing the tribes that were recognized on

June 18, 1934. Interior published a document in 1946 in which it listed the tribes that had held elections pursuant to IRA section 18, and prepared a list tribes recognized in 1950 for submission to Congress. These documents are attached as Appendix B.[4/] Some groups, like the Narragansett, that were not included on these lists, but which believed they had maintained government-to-government relationships with the United States, have since sought to be acknowledged as tribes; and in 1978, Interior promulgated the Part 83 regulations to establish a uniform process for considering such requests. 43 Fed. Reg. 39361 (attached as Appendix C).[5/] Groups seeking acknowledgment under the Part 83 regulations must provide proof, *inter alia*, of their continuous existence as tribes from at least 1900 (25 C.F.R. 83.7), unless they can show unequivocally that they existed in a recognized government-to-government relationship with the United States more recently. 25 C.F.R. 83.8 (a). Tribes that can demonstrate previous federal acknowledgment as tribes need only prove their continuous tribal existence from the date they were last recognized to the present. 25 C.F.R. 83.8(d). Attached as Appendix D to this brief are Federal Register notices announcing the acknowledgment of ten of the tribes whose land records appear in

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[4/] The State mistakenly refers (St. 8/23/05 Br. at 7 n.4) to termination statutes in its discussion of administrative acknowledgment. Because only Congress has authority to reverse such legislative action, the acknowledgment regulations do not apply to tribes whose relationship to the United States was terminated by statute. See 25 C.F.R. 83.3(e), and see Cohen, *Handbook of Federal Indian Law* (2005 ed.) at pp. 163-168.

[5/] Interior published a list of tribes then in a government-to-government relationship with the United States, in conjunction with the publication of the Part 83 acknowledgment regulations, in 1979. See App. C.

Appendix A, none of which indicates that the tribes acknowledged were "recognized" in 1934. These records demonstrate that the State's representations, made in its August 23, 2006, brief at 8-13, and at oral argument, to the effect that these tribes were recognized in 1934, are erroneous and should be disregarded.

The Secretary's exercise of section 5 authority to take lands in trust for these tribes, and others recognized since 1934, demonstrates that the Secretary interprets his section 5 authority to extend to all recognized tribes, and not only to tribes recognized in 1934. A recent report of the Government Accounting Office, attached as Appendix E, provides the most current information regarding tribal acknowledgments and trust land holdings. App. E at pp. 13-19. This information further demonstrates that the Secretary takes land into trust for tribes without regard to their acknowledgment status in 1934.

2. In enacting the 1994 amendments, Congress prohibited the Secretary from making the distinction the State urges here.

The State has sought (Reply Br. 22) to minimize the significance of the 1994 amendments to the IRA, which added two sections prohibiting federal agencies from categorizing tribes, and requiring that all recognized tribes be afforded equal privileges and immunities.[6] See 25 U.S.C. § 476(f)-(g). Subsection 476(f) of the Act

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[6] These provisions read as follows:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations
>
> Departments 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 (25 U.S.C. 461 et seq., 48 Stat. 984), as amended, or any other (continued...)

as amended provides that "agencies of the United States" * * * shall not * * *make any decision or determination pursuant to the [IRA] or any other Act of Congress, with respect to a federally recognized Indian tribe that * * * diminishes the privileges * * * available to the Indian tribe relative to other federally recognized tribes." In other words, the Secretary may not withhold IRA benefits from later-acknowledged tribes that it would extend to other recognized tribes, unless Congress has specifically so directed.

The State's only response to the argument that the Secretary lacks discretion under this provision to decline to take land into trust for recognized tribes on the ground that they were not recognized in 1934 is that the amendments did not change the definition of "Indian" in section 19, 25 U.S.C. § 479 (see Reply Br. at 22-23; 7/11/06 St. Supp. Br. at 13). But these amendments, coupled with the Federally Recognized Tribe List Act, 25 U.S.C. § 479a-1, make clear that Congress has not directed that the Secretary take land into trust only for tribes that were recognized and

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[6/](...continued)

> Act of Congress, 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.
>
> (g) Privileges and immunities of Indian tribes; existing regulations
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

under federal jurisdiction in 1934. The List Act,[7] which also was enacted in 1994, amended section 19 to add a provision requiring the Secretary to maintain a list of all recognized tribes, including tribes acknowledged pursuant to the Part 83 regulations. In the absence of legislation specifically limiting the Secretary's discretion with respect to any specific tribe, reservation, or state, the amendments to section 16 prohibit any administrative decision that would diminish the privileges of any tribe on that list relative to any other tribe on that list. A decision to refuse to take land into trust for the Narragansett Tribe on the basis of its acknowledgment status in 1934 would do just that.

Indeed, the amendments to 25 U.S.C. § 476 were enacted specifically to address a distinction between historic and modern tribes that had been drawn by Interior on the basis of a 1936 Solicitor's Opinion.[8] Interior had taken the position

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[7] The List Act defines "tribes" to include "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," and provides that "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

[8] Senator McCain in introducing this provision stated that "[t]he recognition of an Indian tribe by the Federal Government is just that – the recognition that there is a sovereign entity with governmental authority which predates the U.S. Constitution and with which the Federal Government has established formal relations. Over the years, the Federal Government has extended recognition to Indian tribes through treaties, executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Regardless of the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority."

(continued...)

that tribes organized pursuant to the IRA's provision recognizing "the Indians resident on one reservation" as tribes were different from other, "historic" tribes with respect to certain sovereign powers.[9/] Congress amended the IRA in 1994 to eliminate any such distinction. Thus, although the amendments did not specifically address the rights of tribes pursuant to section 5, they were intended to eliminate any distinction between tribes recognized in 1934 and those whose existence as tribes has

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[8/](...continued)

Senator Inouye, then Chairman of the Senate Committee on Indian Affairs and one of the authors of the Amendment stated that "The amendment which we are offering to section 16 will make it clear that *the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes*." (Emphasis added.) Senator Inouye went on to say that "[o]ur amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. * * * This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA." 140 Cong. Rec. S6144-03 (May 19, 1994), 1994 WL 196882.

[9/] As explained in the July 13, 1994, Solicitor's Opinion, attached as Appendix F, the distinction had its genesis in an April 15, 1936, Solicitor's Opinion that had interpreted section 16 of the IRA as distinguishing between the governmental powers of so-called "historic" and "non-historic" tribes, the latter or which were Indian groups organized on the basis of their residence upon reserved lands. The distinction concerned the scope of inherent sovereign powers that could be exercised by this latter group, without delegation from the Secretary of the Interior. As explained in the 1994 Opinion (App. F at 4), the distinction did not have wide practical effect. Rather, it had come into play in the context of the BIA's review of tribal constitutions and amendments and then only with respect to fewer than twenty of the more than five hundred federally recognized tribes. In 1994, Interior sharply criticized the distinction in testimony before the Senate (*id* at 3). Ultimately, however, Congress acted to overrule the 1936 Opinion before the Interior Solicitor had completed his reconsideration of the issue.

been acknowledged more recently. The State urges this Court to draw precisely the kind of distinction that is prohibited by the amendments.

The history of the 1994 amendments is briefly noted in the State's Reply brief at 23, and we have attached as Appendix F a recent opinion of the Solicitor of the Interior that more fully explains the issue that prompted their enactment, and a portion of the congressional debate leading to the amendments. This history is significant here for two reasons: First, as we have argued previously (US Br. 15-18; En Banc Supp. Br. 11-12), it clarifies that Interior's definition of "tribe" in the Part 151 regulations governing trust land acquisition is consistent with the statute. By amending the act to eliminate distinctions between federally-recognized tribes for *any* purpose, including decisions made pursuant to the IRA, rather than to require Interior to narrow its interpretation of "tribes" eligible for trust lands, Congress effectively ratified the Secretary's interpretation. Moreover, this history illustrates that the IRA anticipated the existence of "tribes" that were recognized for the first time after the statute's enactment. Both Congress and Interior therefore recognize that "tribes," for purposes of the IRA, were not necessarily "recognized and under federal jurisdiction" on June 18, 1934, and Congress has forbidden the Secretary to make any decision that diminishes the privileges available to tribes on this basis.

Finally, the State suggested at oral argument that the IRA distinguished between tribes on the basis of their recognition in 1934, because its purpose was to remedy the effects of the allotment policy. But the 1994 amendments make emphatic that the IRA does not distinguish between tribes that lost their lands as a consequence of the federal allotment policy, and those whose land was appropriated contrary to the

Non-Intercourse Act, 25 U.S.C. § 177. Even assuming that the drafters of the IRA did not anticipate the recognition of tribes that had never been removed to reservations or whose lands had been appropriated before the enactment of the General Allotment Act, nothing in the statute prohibits trust land acquisition for the benefit of such tribes. As the Secretary of the Interior at the time of the IRA explained, "the job of taking the Indian's lands away [was] begun by the white man through military expeditions and treaty commissions [and] was completed by cash purchase – always of course, of the best lands which the Indian had left." *Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30, 1938,* at 211. The Secretary expressed the land policy of the IRA as one of "help[ing] the Indian to build back his landholdings to a point where they will provide an adequate basis for a self-sustaining economy, a self-satisfying social organization." *Id.* The policy goal, in other words, was to remedy the effects of land loss generally, not the effects of the allotment policy specifically. This Court should defer to Interior's interpretation of its authority to take land into trust under the IRA, rather than adopting a new interpretation formulated by the State to support its argument. See *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837.

The decision challenged in this lawsuit, to acquire 32 acres of land in trust, for use by a recognized tribe as a housing development, was consistent with both the language and the purpose of the IRA, and was made in compliance with all other applicable law. It therefore must be affirmed.

CONCLUSION

For the foregoing reasons and those explained in our earlier briefs in this matter, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 6, 2007, copies of the Supplemental Brief for the Federal Appellees on Rehearing *En Banc* were served upon counsel by placing the same in the United States Mail, postage prepaid and addressed as follows:

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