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 CHARLESTON, 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 *AMICUS CURIAE* OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS FILED WITH CONSENT OF ALL PARTIES IN SUPPORT OF DEFENDANTS-APPELLEES AND FOR AFFIRMANCE

C. BRYANT ROGERS
ROTH, VanAMBERG, ROGERS,
ORTIZ & YEPA, LLP
Post Office Box 1447
Santa Fe, NM 87504-1447
(505) 988-8979 – Office
Application for Admission Pending

CHARLES A. HOBBS #41524
HOBBS, STRAUS, DEAN &
WALKER, LLP
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282 – Office

Attorneys for *Amicus* Mississippi
Band of Choctaw Indians

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## CONSENT OF ALL PARTIES

As shown below, this case is of vital interest to the Mississippi Band of Choctaw Indians. This *amicus* brief is submitted with the consent of all parties pursuant to Rule 29(a) Fed. R. App. Proc. It supports Defendants-Appellees and seeks affirmance of the District Court. This *amicus* brief is hereby timely resubmitted per this Court's Order of April 21, 2004. A Motion for Leave to file the appendices referenced herein has also been timely submitted per that Order. The arguments in the brief remain valid whatever the disposition of that motion. The appendices simply provide easy confirmation of quotes from filings of record in U.S. v. John, 437 U.S. 634 (1978) the record of which is archived and not readily accessible from the U.S. Supreme Court Clerk.

## INTEREST OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

The Mississippi Band of Choctaw Indians (the "Tribe") is a federally recognized Indian Tribe located in the State of Mississippi. The Tribe was organized and recognized by the Secretary of the Interior in 1945 pursuant to § 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 988 (the "IRA"), codified at 25 U.S.C. § 476. Its members today include persons descendant of those few Choctaw Indians who were not removed to the "Indian territory" (now encompassed by the State of Oklahoma) during the "Indian Removal" period of the

1830s. Between 1939 and 1944 the United States took lands into trust for the Mississippi Choctaws under 25 U.S.C. § 465, and declared those lands to constitute the Choctaw Indian Reservation under 25 U.S.C. § 467.

The Choctaws remaining in Mississippi after the main part of the Tribe had been removed to the west were left landless. *U.S. v. John*, 437 U.S. 634, 641-646 (1978). They were the paradigm for landless Indians for whom the Secretary of the Interior was authorized by Congress to acquire lands and place them in trust under § 465 in furtherance of the broad, rehabilitative purposes of the IRA. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) ("The purpose of the Indian Reorganization Act of 1934 was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" (quoting H.R. Rep. No. 1804, 73rd Cong. 2d Sess., 1 (1934)); *see, State of Florida, Dept. of Business Regulation v. United States Dept. of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985) ("The grant of authority to the Secretary of the Interior to acquire land for the Indians was central to this purpose."), *cert. denied*, 475 U.S. 1011 (1986); *see also Chase v. McMasters,* 573 F.2d 1011, 1016 (8th Cir. 1978).

The deplorable living condition of the Mississippi Choctaws before the federal trust land acquisition program was initiated for their benefit is well documented:

> 'Practically all of the Mississippi Choctaws are full-bloods. Very few own their homes. They are almost entirely farm laborers or share croppers. They are industrious, honest, and necessarily frugal. Most of them barely exist, and some suffer from want of the necessaries of life and medical aid. In many of the homes visited by me there was conspicuous evidence of pitiable poverty. I discovered families with from three to five children, of proper age, not one of whom had spent a day of their life in school. With very few exceptions they indicated willingness to go to school, as did their parents to send them. Several young Choctaw boys and girls expressed an ardent desire for an education.' "Report of the Commissioner of Indian Affairs," in 2 Reports of the Department of the Interior, 1918, pp. 79-80 (1919).

*U.S. v. John, supra* at 645, n.2

Pursuant to § 5 of the IRA, 25 U.S.C. § 465, some 11,756 acres of land were acquired and placed into trust for the Mississippi Choctaws by the Secretary between 1934 and 1944. Some 3,651 acres of land were also acquired by the Secretary and placed into trust for the Mississippi Choctaws pursuant to a variety of other statutes culminating in the Act of June 21, 1939, 53 Stat. 851. *U.S. v. John, supra,* at 645 and n. 13. *See,* "Proclamation — Lands acquired for the Benefit of Choctaw Indians in Mississippi," 9 Fed. Reg. 14907 (December 23, 1944).

When these trust land acquisitions were made under the 1939 Act and under § 5 of the IRA, they were not acquired within the "boundaries" of any then-existing Indian reservation. No Indian reservation then existed within the State of Mississippi. Each of these trust land acquisitions became a part of what was proclaimed by the Secretary of the Interior in 1944 to be the Choctaw Indian

Reservation. That proclamation was made pursuant to § 7 of the IRA, 25 U.S.C. § 467, 9 Fed. Reg. 14907 *supra*; *U.S. v. John, supra*, at 646. After the Secretary's Proclamation, the Tribe formally organized itself, adopted a constitution and was recognized as a separate Indian tribe pursuant to § 16 of the IRA. *U.S. v. John, supra* at 646.

Since the 1944 Proclamation, some 5,000 additional acres have been acquired and placed into trust for the Tribe by the Secretary pursuant to § 5, and made part of the Choctaw reservation. Additional acres are now in the process of being transferred to trust land status under that statute.[1]

Over the years, as the Tribe began to grow in numbers and develop economically, there has been a great deal of litigation in state and federal courts about the reservation status and "Indian Country" status (under 18 U.S.C. § 1151 *et seq.*) of the trust land acquired for the Tribe by the Secretary. *U.S. v. State Tax*

---

[1]More land was placed into trust and reservation status for the Mississippi Choctaws by separate federal statutes in June 2000 and December 2000. This was done because of the long delays experienced by the tribe in securing the processing of applications to have that land placed into trust and reservation status through the ordinary process authorized by §§ 5 and 7 of the IRA. *See*, Pub. L. 106-228, 114 Stat. 462, Act of June 29, 2000, as amended by Pub. L. 106-568, Title VIII, § 811, 114 Stat. 2917, Act of December 27, 2000 (adding two additional tracts), as amended by Pub. L. 108-204, Act of March 2, 2004 (clarifying the legal descriptions of the land taken in trust in June and December 2000). § a(1) of Pub. L. 106-228 provided that "notwithstanding any other law – (1) all lands taken into trust by the United States for the benefit of the Mississippi Band of Choctaw Indians on or after December 23, 1944, shall be part of the Mississippi Choctaw Indian Reservation."

*Comm'n of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (5th Cir. 1976), *aff'd on rehearing en banc*, 541 F.2d 469 (5th Cir. 1976); *Tubby v. State*, 327 So. 2d 272 (Miss. 1976); *John v. State,* 347 So.2d 959 (Miss. 1977) and *U.S. v. John,* 560 F.2d 1202 (5th Cir. 1977). The latter two cases were expressly reversed by *U.S. v. John*, 437 U.S. 634 (1978).[2] The decision in *U.S. v. John* also superceded any holdings or *dicta* in the other cases listed above at variance therewith.

After *U.S. v. John, supra*, it appeared that all essential legal questions regarding the reservation status and "Indian Country" status of its trust lands, and respecting the Tribe's right to have additional lands taken into trust by the federal government on its behalf under § 5, were finally settled by the unanimous decision in that case. The Tribe's economic growth and the improvement in the living conditions of its members since the *U.S. v. John* decision – and its clarification of the legal status of those trust lands – have been truly phenomenal.

Thus, the Tribe has a significant interest in this Court's interpretation of § 5 of the IRA and in the continued integrity of the Supreme Court's decision in *U.S. v. John* and in how that decision is construed respecting the constitutionality of the IRA.

---

[2] Subsequent to *U.S. v. John*, the U.S. Supreme Court again ruled for the Tribe on a jurisdictional issue arising under the Indian Child Welfare Act, 25 U.S.C. § 1901,

## SUMMARY OF ARGUMENT

I. Rhode Island argues that § 5 of the IRA, 25 U.S.C. § 465, does not validly authorize the Secretary of the Interior to take land in trust for an Indian tribe and, thereby, oust a portion of the state's jurisdiction over that land, without the state's consent. Rhode Island cites (inter alia) the "federal enclave" section of the U.S. Constitution (Art. I, § 8, Cl. 17), which gives Congress exclusive legislative power over lands purchases by the U.S. for forts, arsenals, dockyards, "and other needful Buildings," with the state's consent:

> Section. 8. [The Congress shall have the Power] . . . To exercise exclusive Legislation . . . and . . . Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings . . . ." (Emphasis added.)

The simple answer to the "federal enclave" argument is that the Narragansett Tribe's 31 acres in question were acquired not for the erection of forts, etc., but "for the purpose of providing land to Indians," 25 U.S.C § 465, and this purpose is authorized by Art. I, Sec. 8, Cl. 3 (not Cl. 17), which delegates power to Congress "to regulate Commerce . . . with the Indian Tribes . . . ." *See McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 n.7 (1973); Felix S. Cohen's Handbook of Federal Indian Law (1982 edition Michie), pp. 207-212.

---

*et seq.,* respecting the Choctaw Indian Reservation. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989).

The purpose of Point I of this brief is not primarily to address the merits of the "federal enclave" argument, but to show that that argument was necessarily rejected by a unanimous Court in *United States v. John,* 437 U.S. 634 (1978). To be sure, the *John* Court's opinion does not expressly mention the "federal enclave" argument in those words. But, it is clear from the record of *John* that the "federal enclave" argument was a central basis for the State Court's decision in *John v. State,* 347 So.2d 959 (Miss. 1977), then before the Court on appellate review, it was briefed and argued to the Court; and, if accepted, would have been fatal to the Choctaw defendants' argument that the State did not have criminal jurisdiction over him (an argument the Court unanimously accepted). It is, therefore, clear that the Supreme Court in *John* rejected the "federal enclave" clause argument that State consent is required before exclusive federal "Indian Country" jurisdiction can be created by taking land into trust under § 5 of the IRA. The *John* decision thus leaves no room for the argument that the state must consent before land can be taken into trust for a Tribe under § 5 of the IRA.

II. The federal power to take land in trust for Indians and the powers reserved to the State by the Tenth Amendment are mutually exclusive categories. That is, if the U.S. has the power under the Constitution to take land in trust for Indians (as Congress authorized in § 5 of the Indian Reorganization Act), then it necessarily follows that the Tenth Amendment cannot be offended by the exercise

of that federal power. Since the existence of the Congress's plenary power over Indian affairs is well settled and § 5 of the IRA falls squarely within the core of that federal power, the Tenth Amendment can pose no constitutional impediment to the enactment or implementation of that statute.

## ARGUMENT

### I. *U.S. V. JOHN* FORECLOSES THE ARGUMENT THAT PLACING LAND INTO TRUST UNDER § 5 OF THE IRA WITHOUT STATE CONSENT VIOLATES THE FEDERAL ENCLAVE CLAUSE OF THE U.S. CONSTITUTION.

The State of Rhode Island Appellants ("Rhode Island") argue (Br. pp. 59-63) that federal action taking land into trust for an Indian Tribe under § 5 of the IRA without state permission "is an unconstitutional violation of the Enclave Clause" because such action creates an area of "exclusive" federal jurisdiction without obtaining state consent for the creation of federal enclaves under U.S. Const., Art. I, § 8, Cl. 17.

The State *Amici* (Br. pp. 19-24) likewise argue that:

> The Enclave Clause of the United States Constitution, Article I, Sec 8, cl. 1 (sic. 17), limits congressional power by prohibiting it from establishing a federal "enclave" in which the federal government exercises "exclusive jurisdiction" without first obtaining the affected State's consent. . . . (pp. 19-20).
>
> * * * *
>
> The taking of land in trust by the federal government for Indians outside an original reservation without the consent of the state violates the Enclave Clause. Such acquisitions are argued to transform such

> land into "Indian Country" under federal law and thereby divest the states of primary jurisdiction over the land. (p. 21).

The case of *U.S. v. John*, 437 U.S. 634 (1978) is cited numerous times by Rhode Island and the State *Amici*, often in ways which suggest that the decision supports their "federal enclave" argument. State *Amici* Br., p. 10, n.3 and 21; Rhode Island Br., pp. 59-63.

On the contrary, *U.S. v. John* necessarily rejected this argument.

In *U.S. v. John*, the Court had before it two consolidated cases. One was on appeal from the Mississippi Supreme Court, *John v. State,* 347 So.2d 959 (Miss. 1977) (No. 77-575) and one was on *certiorari* to the U.S. Court of Appeals for the Fifth Circuit, *U.S. v. John*, 560 F.2d 1202 (5th Cir. 1977) (No. 77-836). *U.S. v. John, supra,* 437 U.S. at 634-638. In both of these cases, the courts had ruled that lands taken into trust for the Mississippi Choctaws under the IRA without state consent and "designated as a reservation . . . on which the offense took place, were not 'Indian country,' and that, therefore, § 1153 did not provide a basis for federal prosecution" of Smith John, a Mississippi Choctaw. Smith John had been convicted in both the State and the Federal Courts for the same criminal assault. *U.S. v. John, supra* at 637, 651-652.

The state argued *inter alia* in *U.S. v. John,* that without state consent "the federal government has no power to produce" the creation of Indian Country subject to exclusive federal criminal jurisdiction over Indian offenders under 18

U.S.C. §§ 1151 and 1153 in Mississippi by placing land into trust per § 5 of the IRA. *U.S. v. John, supra* at 637, 652.

The Supreme Court noted (at 637) that the Mississippi Supreme Court's ruling against Smith John in *John v. State* was based upon the latter court's "earlier decision in *Tubby v. State,* 327 So.2d 272 (1976), and on the decision of the U.S. Court of Appeals for the Fifth Circuit in *U.S. v. State Tax Comm'n,* 505 F.2d 633 (1974), *rehearing denied*, 535 F.2d 300, *rehearing en banc denied*, 541 F.2d 469 (1976)."[3]

---

[3] The District Court in the instant case below, 290 F.Supp. 2d 167, 179-181 (D. R.I. 2003), addressed the Fifth Circuit's statements in an earlier case, *U.S. v. State Tax Comm'n of Mississippi,* 505 F.2d 633 (5th Cir. 1974), that § 5 of the IRA could not be used to place lands into trust for the Mississippi Choctaws since (the Fifth Circuit asserted) the IRA was not intended to apply to Tribes which were not under federal jurisdiction at the time the IRA was enacted in 1934. The District Court below properly noted that § 19 of the IRA (25 U.S.C. § 479) contained several alternative definitions of "Indian Tribe", one of which was found in *U.S. v. John*, *supra* at 649-650 to apply to the Mississippi Choctaws. That ruling provided part of the basis for the Supreme Court's decision in *U.S. v. John* that the lands taken into trust for the Mississippi Choctaws under § 5 of the IRA did constitute Indian Country and did create an area of exclusive federal criminal jurisdiction over the crime there at issue. It is important to note, however, that the Fifth Circuit's IRA analysis was unnecessary to its ruling that the tribally owned but *state chartered corporation* whose tax status was there at issue was not exempt from the challenged Mississippi sales and contractor taxes. This is because the Fifth Circuit based its tax ruling on the "non-Indian" status of that state chartered corporation, ruled that the taxes at issue were not preempted by federal law even if the Mississippi Choctaws were a federally recognized Indian tribe and even if the lands taken into trust for them by the U.S. did constitute Indian Country. *U.S. State Tax Comm'n of Mississippi, supra*, at 634-638. Thus, the Fifth Circuit's later discussion regarding the asserted legal status of the Mississippi Choctaws and their trust lands and the asserted inapplicability of the IRA to the Mississippi Choctaws

The earlier decision in *Tubby v. State, supra,* involved the question whether a Choctaw Indian's federal trust allotment constituted an area of exclusive federal "Indian Country" jurisdiction under 18 U.S.C. §§ 1151(c) and 1153. The Mississippi Supreme Court's answer was "no." That ruling was based in part upon the State Court's view that any such result was barred by the "Arsenals and Dockyards" clause (also sometimes referred to as the "federal enclave" clause) of the U.S. Constitution:

> The question then arises as to whether or not the United States government is authorized by the Constitution of the United States to purchase land in a sovereign state of the union, without its consent, for the purpose of giving the land to a Choctaw Indian citizen who resides in the state, so as to deny the state criminal jurisdiction over crimes committed by an Indian on the purchased land.
>
> Article I, § 8(17), U.S. Constitution is in the following language:
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . .

---

or to other tribes not federally recognized in 1934 was *dicta*. This is made even clearer in the Fifth Circuit's subsequent decision denying rehearing, 535 F.2d 300 where the Court first summarized the ruling in its prior opinion as follows: "'In the prior opinion we held that Chata, a Mississippi corporation, chartered in compliance with Mississippi law, is an entity separate and apart from the Mississippi Band of Choctaw Indians; that in this suit the United States is attempting to lend its name to a suit on behalf of a private corporation and thus was not a real party in interest.' We adhere to that view." *Id.* at 301-302.

> This section simply means that in order to obtain jurisdiction over lands in Mississippi it is necessary first to obtain the consent of the Legislature of this state to so do. *See Paul v. United States,* 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963).
>
> * * * *
>
> Inasmuch as the State of Mississippi has not consented to the acquisition of territory within this state for the purpose of establishing Indian reservations by the United States, through the Secretary of Interior, the State of Mississippi has not lost civil and criminal jurisdiction over such land so purchased, or the Indian citizens living thereon.

*Tubby v. State, supra* at 281-284.

This is the identical "federal enclave" argument here raised by the Rhode Island Appellants and the State *Amici.* Rhode Island Br., pp. 59-63; State *Amici* Br., pp. 19-24. Indeed, one of the questions presented in Smith John's Jurisdictional Statement seeking appellate review of *John v. State* in the U.S. Supreme Court was, "Is the re-establishment of Indian Country in Mississippi precluded by . . . the Arsenals and Dockyards Clause of the Constitution, Article I, § 8, cl. 17?" (App. A, p. 4)

In the *U.S. v. John* proceedings before the Supreme Court, the State of Mississippi reiterated its reliance upon *Tubby v. State* (Br. of the State, p.2., fn.1 (App. B); State's Motion to Dismiss No. 77-575, pp. 4, 5, 10 (App. C)) and emphasized in its Brief at p. 45, n. 11 (App. B) that:

> There is absolutely no evidence of Congressional enactments, State of Mississippi Legislature or otherwise that the State of

> Mississippi was requested to or ceded jurisdiction over the subject lands to the United States government. The lands in question, presumably, were purchased from private parties over the years without the knowledge or consent of the State of Mississippi.

The State's "federal enclave" argument was expressly addressed by Petitioner Smith John (Br. at p. 37) (App. D) as follows:

> The third contention of invalidity of the statutes as applied is that the consent of the state is required for federal jurisdiction over the Choctaws, relying on the arsenals and dockyards clause, Const., art. I, § 8, cl. 17. However, the authority of Congress over Indian affairs does not arise from that clause, but rather from the commerce clause and treaty power and from the property clause. In *United States v. McGowan,* 89 F.2d 201, 202 (9th Cir. 1937), the court held that application of an Indian country statute was precluded by the arsenals and dockyards clause, but this Court also rejected a state consent argument in *Antoine v. Washington,* 420 U.S. 194, 200-05 (1975).
>
> The foregoing arguments can perhaps be summarized under a general claim that the federal government lacks authority to preempt jurisdiction over Indians within a state after statehood. However, this argument has been rejected by this Court in a number of contexts.

The U.S. likewise attacked this ground for the State's position that the federal government had no power to create an area of exclusive federal Indian Country jurisdiction in Mississippi without the State's consent. (Br. of the U.S. at 38-39 (App. E)):

> Nor is state consent a prerequisite to the exercise of Congress's power under the Property Clause or its power over Indian affairs. Although Congress may acquire derivative legislative power from a state pursuant to Article I, Section 8, clause 17 of the Constitution (the Arsenals and Dockyards Clause), see *Paul v. U.S.*, 371 U.S. 245, the powers asserted here are not derived from that clause but are independent and unrelated. As this Court stated in *Kleppe v. New*

*Mexico, supra,* with regard to the Property Clause (426 U.S. at 543): "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause * * *. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause" (citations omitted).

These principles apply fully to the exercise of Congress' powers over lands held for the Indians' benefit; otherwise, essential federal programs might well be put "completely at the mercy of state legislation" (*Kleppe v. New Mexico, supra,* 426 U.S. at 543). Accordingly, Congress had the power to declare the Mississippi Choctaw lands "Indian country" and assert federal criminal jurisdiction over them.

This issue was also addressed by the U.S. in oral argument (Tr., p. 18, (App. F)) as follows:

MR. FARR: Well, when we are talking again about exclusive jurisdiction, this is the point I made originally, the type of jurisdiction they are asserting there is not the exclusive jurisdiction that you get under the Arsenals and Dockyards clause, for example, if the state consents to give it to you where basically you become the full, entire sovereign for that area and the state just keeps out - - with some limited exceptions.

What we are saying here is that as this Court recognized in Surplus Trading Company versus Cook, that the state continues to be a sovereign over these areas. It continues to have certain sovereign rights over these areas.

What the State does not have - - and this is exactly what the Court said in Surplus Trading Company by way of example - - what this case does not have is full sovereignty over the Indian wards. The Federal Government has the sovereignty and to that extent it premepts [sic] that bit of state sovereignty.

The *Surplus Trading* case referenced by the U.S. in oral argument was *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). There the Court clearly distinguished the acquisition of absolute federal jurisdiction over a particular area within a State under Art. 1, § 8, Cl. 17, U.S. Constitution (which clearly requires state consent), from the quite different circumstance by which some state jurisdiction is preempted and exclusive federal jurisdiction arises respecting the conduct of Indians in "Indian Country" created by federal action taken incident to the Congress' plenary power over Indian affairs (which does not require state consent):

> It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
>
> 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 that they can have only restricted application to the Indian wards.
>
> ****
>
> But Camp Pike is not in the same class with any of the reservations of which we have spoken and should not be confused with any of them.
>
> ****

> The question is not an open one. It long has been settled that, where lands for such a purpose are purchased by the United States with the consent of the state Legislature, the jurisdiction theretofore residing in the state [i.e. over Indians] passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.

*Id.* at 456-457[4]

It is, therefore, clear that the U.S. Supreme Court's rejection of Mississippi's argument "that the federal government has no power" without state consent to remove lands from the reach of ordinary state criminal jurisdiction by placing those lands in trust status under § 5 of the IRA, *U.S. v. John, supra* at 651-652, was also a rejection of the Mississippi Supreme Court's ruling in *Tubby v. State* (as reaffirmed by that court in *John v. State*) that if the IRA "produced this result" without the State's consent, it was forbidden by the Art. I, § 8, Cl. 17. Had the Supreme Court not rejected the very "federal enclave" argument here raised by Rhode Island and the State *Amici* – the same argument previously adopted by the Mississippi Supreme Court in *Tubby v. State* and *John v. State* – it could not have

[4] Subsequent to *Surplus Trading Company,* the proposition that Indian Reservations and other "Indian Country" remain a part of the territory of the states within which they are located, that "State sovereignty does not end at a reservation's border" except as preempted by federal law, and that the legal basis for the creation of such "Indian Country" is not found within Art. I, § 8, Cl. 17, have been repeatedly reaffirmed by the Supreme Court. *Nevada v. Hicks*, 535 U.S. 353, 365-366 (2001); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164,172 n. 7 (1973); *U.S. v. McGowan*, 302 U.S. 535 (1938).

found (as it did) that the land taken into trust for the Mississippi Choctaws under § 5 of the IRA without the State's consent constituted "Indian Country" which gave rise to an area of exclusive federal criminal jurisdiction over major crimes by Indians under 18 U.S.C. §§ 1151, 1153. [5]

## II. CONGRESS'S EXERCISE OF ITS INDIAN AFFAIRS POWERS UNDER THE CONSTITUTION THROUGH PASSAGE OF § 5 OF THE IRA DOES NOT VIOLATE THE TENTH AMENDMENT

With the ratification of the Constitution, the States relinquished all authority to regulate affairs with Indian Tribes. *Seminole Tribe of Florida v. Florida*, 517

---

[5] It is well-settled that some U.S. Supreme Court decisions resolve issues of law by negative implication from the holdings in those cases when those holdings reverse lower court decisions based on legal principles which are irreconcilable with the holding of that Supreme Court case, even where there is no express mention of that particular legal principle in the Supreme Court's decision. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001), as construed in *Crumpacker v. Kansas Department of Human Resources*, 338 F.3d 1163, 1171 (10th Cir. 2003) (in citing the Supreme Court's rejection of the Ninth Circuit's interpretation of Title VII regarding grounds for retaliation claims, the Tenth Circuit stated that ". . . the Court did *implicitly reject* any interpretation of Title VII which would permit a plaintiff to maintain a retaliation claim based on an unreasonable good-faith belief that the underlying conduct violated Title VII. Accordingly, the Supreme Court's decision in *Clark* supercedes and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an unreasonable good-faith belief that the underlying conduct violated Title VII." (emphasis added, internal citations omitted); *United States v. O'Hagan*, 521 U.S. 642 (1997), as construed in *Wonsover v. Security and Exchange Commission,* 205 F.3d 408, 414 (D.C. Cir. 2000) (in analyzing argument by stockbroker accused of violating Securities Act of 1933, D.C. Circuit noted that stockbroker's argument regarding the "willfulness" of his actions had previously been rejected by implication by the U.S. Supreme Court in a case cited by stockbroker, *United States v. O'Hagen,* 521 U.S. 642, 117 S.Ct. 2199 (1997) and that the Eighth Circuit had acted in

U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that *the States* still exercise some authority over interstate trade but *have been divested of virtually all authority over Indian commerce and Indian tribes*") (emphasis added). *See Oneida County, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *cf. Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1307-1308 (D. N. Y. 1983) (". . .there is no support for the view that the Tenth Amendment preserves any preconstitutional attributes of sovereign immunity. . . with respect to Indian affairs within the scope of Congressional power under Article I.")

Three Constitutional provisions confirm the states' full divestiture of power over Indian Tribes. The most important provision is the so-called Indian Commerce Clause: "Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians not members of any state; provided the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution;

---

accordance with the Supreme Court regarding its interpretation of the Act on

and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes . . . ." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *see also Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 616 (2nd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

The only limit on Congress' plenary power over Indian Tribes is that the actions taken by Congress must be rationally related to the fulfillment of Congress' trust obligations toward individual Indians and Indian tribes. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977). The State of Rhode Island expressly acknowledged Congressional plenary authority over Indian affairs when it agreed to seek Congressional approval of the Settlement Act. *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994).

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States...." *New York v. United States*, 505 U.S. 144, 156 (1992). This Court has previously recognized that states have no Tenth Amendment interest in areas where Congress maintains plenary authority; for example, in immigration affairs. *See Herrera-Inirio v. Immigration and Naturalization Service*, 208 F.3d 299, 307 (1st Cir. 2000)

---

remand).

("Because Congress possesses plenary authority over immigration-related matters, it may freely displace or preempt state laws in respect to such matters.")

The district court correctly held that "because the power to regulate Indians is one conferred on the federal government, the Tenth Amendment does not reserve such authority to the States." *Carcieri v. Norton*, 290 F. Supp. 2d 167, 189 (D. R.I. 2003) (*citing City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154 (D. D.C. 2002). *aff'd* 348 F.3d 1020 (D.C. Cir. 2003), *cert. den'd sub nom., Citizens for Communities v. Norton,* 2004 WL 297021 (April 5, 2004)). "[N]either the fact that an Indian tribe has been assimilated, nor the fact that there had been a lapse in federal recognition of a tribe, was sufficient to destroy the federal power to handle Indian affairs." *City of Roseville*, 219 F. Supp. 2d at 154 (*citing United States v. John*, 437 U.S. 634, 652 (1978)).

Congressional authority over tribal property and land is "one of the most fundamental expressions, if not the major expression, of the Constitutional power of Congress over Indian affairs." *Delaware Tribal Business Committee*, 430 U.S. at 86.

Section 5 of the IRA does not treat states as "federal handmaidens" by "commandeering" state authority or state officials. As this Court succinctly stated, "Congress may not command states to administer federal regulatory programs, conscript state officers directly, or otherwise treat state governments as federal

handmaidens." *Herrera-Inirio v. INS,* 208 F.3d 299, 307 (1st Cir. 2000) (*citing New York v. U.S.*, 179 F.3d 29, 33-34) (2d Cir. 1999), *cert. den* 528 U.S. 1115 (2000)); *see also Hodel v. Virginia Surface Mining & Reclamation*, 452 U.S. at 264, 288 (1981) (Congress may not "commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."). By neither its terms nor its operation does § 5 compel a single action by the State of Rhode Island or its officers. § 5 merely allows the federal government to acquire land in trust for the benefit of individual Indians and Indian tribes, and thereby to create an area of "Indian Country" jurisdiction.

Congress enacted the IRA for the purpose of "encourag[ing] Indians to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976); *see, State of Florida, Dept. of Business Regulation v. United States Dept. of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985) ("The grant of authority to the Secretary of the Interior to acquire land for the Indians was central to this purpose."), *cert. denied*, 475 U.S. 1011 (1986); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (The purpose of the IRA was "to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism.") (*quoting* H.R. Rep. No. 1804, 73rd Cong., 2d Sess., 1 (1934)).

Federal and state courts routinely reject states' contention that the Tenth Amendment constricts Congressional power to legislate for the benefit of Indians and Indian tribes. *E.g.*, *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1858) (upholding constitutionality of federal statute prohibiting non-Indians to settle on Indian land in New York). One federal court, reviewing the Nonintercourse Act, 25 U.S.C. § 177, which invalidates any purchase of Indian land without the consent of the federal government, held that the Act did not unduly interfere with the States' reserved powers under the Tenth Amendment, *see Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359, 1368-69 (D. Conn. 1982). *Mohegan Tribe* involved a land claim brought by an Indian tribe on the theory that the State of Connecticut illegally purchased land from Indians in violation of the Nonintercourse Act. Even though the State owned the land at issue and stood to lose the land in the event the tribe prevailed on its claim, the court held that the Act did "not regulate the State of Connecticut as a state nor address 'matters that are indisputably attributes of state sovereignty.'" *Id.* at 1368 (*quoting Virginia Surface Mining & Reclamation*, 452 U.S. at 288) (quotation omitted).

The court also held that "the State's compliance with the Nonintercourse Act does not in any way impair its ability 'to structure internal operations in areas of traditional functions.'" *Id.* at 1368-69 (*quoting National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). The court concluded that "centuries of case law and

federal legislation have recognized the strength of the federal government's interest in regulating Indian land transactions." *Id.* at 1369 (*citing Oneida Indian Nation v. County of Oneida, New York*, 414 U.S. 661, 669 n. 5 (1974)). If the Nonintercourse Act, which directly regulates state behavior, does not sufficiently implicate the Tenth Amendment, then surely § 5, which requires no action by the states, also does not sufficiently implicate the Tenth Amendment. Great weight should be given the federal interest in regulating tribal land and property. *See also In re A.B.*, 663 N.W.2d 625, 636-37 (N.D. 2003) (upholding the constitutionality of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., from a Tenth Amendment challenge), *cert. denied*, *Hoots v. K.B.*, 2004 WL 717196 (April 5, 2004); *In the Matter of the Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980) (same). *Cf. Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 561-62 (9th Cir. 2002), *cert. granted, sub. nom. Inyo County Calif. v. Paiute-Shoshone Indians of Bishop Colony*, 537 U.S. 1043 (2002), *judgment vacated* 538 U.S. 701 (2003) (upholding constitutionality of Public Law 280, a law allowing states to take criminal and civil jurisdiction over Indians, from Tenth Amendment challenge brought by tribe); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 259 F. Supp. 2d 783, 798-99 (D. Wis. 2003) (upholding constitutionality of Indian Gaming Regulatory Act from Tenth Amendment challenge brought by tribe).

## CONCLUSION

The District Court's rejection of Rhode Island's "federal enclave" and Tenth Amendment arguments should be affirmed.

April 2004
DATE

C. BRYANT ROGERS
ROTH, VanAMBERG, ROGERS, ORTIZ & YEPA, LLP
Post Office Box 1447
Santa Fe, NM 87504-1447
(505) 988-8979 – Office
(Application for Admission Pending)

CHARLES A. HOBBS #41524
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, NW, Suite 700
Washington, DC 20037
(202) 822-8282 – Office

Attorneys for *Amicus* Mississippi Band of Choctaw Indians

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

April 26, 2004
Date

C. BRYANT ROGERS

## CERTIFICATE OF SERVICE

I hereby certify that I caused to be forwarded on the 26th day of April, 2004, a copy of the within brief via regular mail, postage prepaid, to the following:

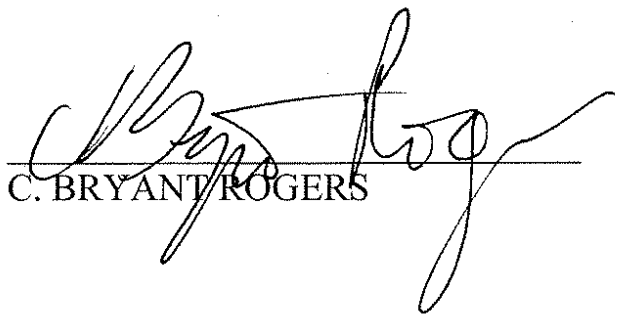
Elizabeth Ann Peterson, Appellate Section
Environmental & Natural Resources Division
Room 8930, Department of Justice
Post Office Box 23795 L'Enfant Station
Washington, D.C. 20026

Anthony C. DiGioia, Esq.
Assistant United States Attorney
800 Fleet Center
Providence, RI 02903

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

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

Patrick C. Lynch, Attorney General
Neil F. X. Kelly, Assistant Attorney General
150 South Main Street
Providence, RI 02903



C. BRYANT ROGERS