415-744-6716

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, a sovereign state of the United States of America, and TOWN OF CHARLESTOWN, RHODE ISLAND,
Plaintiffs-Appellants

v.

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

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

BRIEF OF THE AMICI CURIAE STATES ALABAMA, ALASKA, CONNECTICUT, IDAHO, KANSAS, MISSOURI, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND VERMONT, IN SUPPORT OF THE STATE OF RHODE ISLAND AND REVERSAL OF THE JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

AMICI STATES' SIGNIFICANT INTERESTS

The Amici States submit this brief as of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and in support of the position of the State of Rhode Island.

The States have a significant interest in this Court's interpretation of 25 U.S.C. § 465, the primary federal statute employed by the Secretary of Interior (the "Secretary") to take land into trust for Indians and Indian tribes and relied upon by the Secretary in this case to take land into trust for the Narragansett Indian Tribe of Rhode Island ("Narragansett Tribe"). The conversion of land to trust for Indians has profound and permanent impacts on States, local communities and the public. When the United States takes land into trust for Indians, -- it may be insulated from state and local control in a number of important respects. First, tribal real property within Indian country is not subject to state and local taxation, absent clear congressional authorization, and thus is removed from the local property tax rolls, resulting in significant lost revenues. *E.g., Cass County v. Leech Lake Bank of Chippewa Indians*, 524 U.S. 103, 110-11, 141 L. Ed. 2d 90, 118 S.Ct. 1904 (1998); *County of Yakima v. Confederated Tribes and Banks of Yakima Indian Nation*, 502 U.S. 251, 258, 116 L. Ed. 2d 687, 223 S.Ct. 683 (1992). In addition to this substantial loss of revenue, state civil and criminal jurisdiction may be significantly compromised where tribal land or members are involved, depending

on whether the taking of land into trust makes it "Indian country", a sharply disputed issue. Contrast, *United States v. Stands*, 105 F.3d. 1565 (8th Cir. 1997) with, *United States v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999). The Department of the Interior additionally takes the position that trust land is not subject to state and local land use regulation. 25 C.F.R. § 1.4 (2003). Finally, and significantly, federally recognized tribes occupying "Indian lands," may conduct gaming on those lands in accordance with the Indian Gaming Regulatory Act (IGRA). *See* 25 U.S.C. § 2703(4). The proliferation of Indian gaming since 1988, when the IGRA was enacted, has resulted in increased burdens on States and local communities in the form of added pollution, noise, traffic, and crime.

There are presently over 560 federally recognized Indian tribes in this country, and approximately 250 tribal acknowledgment petitions pending at the Bureau of Indian Affairs (BIA). With this proliferation of recognized tribes and new tribes seeking tribal recognition, the issue of trust land grows in significance as increasingly, the Secretary is improperly employing Section 465 to increase tribal land bases, while simultaneously decreasing the States' territorial boundaries, without the States' consent.

Moreover, as of December, 1997, 56,046,000 acres in 36 states were held in trust.[1] In 1999, the Department of the Interior estimated an annual number of on reservation applications for land in trust at 6,594 and off reservation trust applications at 278. 65 Fed. Reg. 17,574, 17,575 (1999). With 7,000 trust and acquisition applications pending per year, it is clear that the trust land acquisition program has the potential to pose a major impact nationwide.

SUMMARY OF THE ARGUMENT

The Secretary's authority to take land into trust for Indian tribes is limited by the express language and legislative history of 25 U.S.C. § 465 of the Indian Reorganization Act of 1934 (IRA), as well as constitutional provisions intended to protect the States' sovereignty and territorial integrity.

When Congress enacted § 465, it recognized the need to limit the Secretary's authority to take land into trust for Indians and Indian tribes, and inserted express language limiting that authority to tribes that were recognized and under federal jurisdiction in 1934, when the IRA was enacted. Yet, despite this clear and unambiguous language limiting the tribes that qualified for federal trust land, the Secretary continues to ignore it.

Accepting the States' argument that § 465 is limited to tribes that were recognized and under federal jurisdiction in 1934, does not mean that post-1934

[1] *See* U.S. Department of Interior, "Lands under the Jurisdiction of the Bureau of Indian Affairs as of December 31, 1997."

tribes cannot enjoy the benefits of federal recognition, including the taking of land into trust. The authority of the Secretary to take land into trust must derive from another source, such as the provisions of some other express congressional enactment.

Moreover, adoption of the States' interpretation that the IRA should be narrowly construed consistent with its plain language and legislative history, -- as opposed to the DOI's expansive interpretation that its discretion is limitless -- would avoid potential constitutional infirmities, in particular, that Section 465 constitutes an unconstitutional delegation. *See South Dakota v. United States Department of Interior,* 69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996).

If the Court determines that § 465 applies to all Indian tribes, even those recognized after 1934, then § 465 violates important constitutional provisions intended to ensure that congressional delegations include proper standards and protect States' rights and jurisdiction. In particular, the States assert that: (1) 25 U.S.C. § 465 constitutes an unconstitutional delegation because it lacks sufficient and intelligible standards; (2) the Secretary's decision violates the Enclave Clause of Article I, § 8, cl.17 by establishing a federal "enclave" without the State of Rhode Island's consent; and (3) 25 U.S.C. § 465 violates the Tenth Amendment by impermissibly diminishing and infringing on the inherent rights of the States.

ARGUMENT

I. The Secretary's Authority Under 25 U.S.C. § 465 To Take Land Into Trust For Indian Tribes Is Limited To Tribes That Were "Recognized" And "Now Under Federal Jurisdiction" In 1934, When The Indian Reorganization Act Was Enacted.

Based on the plain and unambiguous language of 25 U.S.C. § 465, as informed by the applicable definitions contained in 25 U.S.C. § 479 and the legislative history of the IRA, it is evident that Congress intended to limit the reach of the Secretary's authority to take land into trust to Indian tribes that were recognized and under federal jurisdiction in 1934, when the IRA was enacted.

The district court improperly determined that the recent federal recognition of the Narragansett Tribe was sufficient to qualify the Tribe for the significant benefit of trust land under § 465. However, the district court's interpretation completely ignored the word "now" in the statutory phrase "now under federal jurisdiction," which is also contained in § 479, the applicable definitional section. That word and phrase, like all words and phrases of a statute, cannot be simply ignored. *Negonsott v. Samuels*, 507 U.S. 99, 105, 122 L.Ed.2d 457, 113 S.Ct. 1119 (1993). The intentional insertion of the word "now" in § 479 clearly and unambiguously evinces Congress's intent to limit the reach of § 465 to tribes that were recognized and under federal jurisdiction "now," i.e., or in 1934, when the IRA was enacted.

The determination of this issue is a question of statutory interpretation. It is axiomatic that in interpreting a statute, the Court's "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. at 105; *see also United States v. Meede*, 175 F.3d 215, 219 (1st Cir. 1999); *People to End Homelessness v. Delvelco Singles Apts Assts*, 339 F.3d 1, 5 (1st Cir. 2003); *Textron, Inc. v. Commissioner*, 336 F. 3d 26, 31 (1st Cir. 2003).

Section 465 of the IRA provides that "the Secretary of the Interior is hereby authorized, in his discretion, to acquire, . . . any interest in lands . . . within or without existing reservations, . . . for the purpose of providing land ***for Indians.***" 25 U.S.C. § 465 (Emphasis added). This section further provides that title to lands acquired under section 465 "shall be taken into trust for the ***Indian tribe*** or individual Indian for which the land is acquired." *Id.* (Emphasis added).

The words "Indian" and "tribe" are expressly defined under § 479 of the IRA. It is commonly understood that where a term is defined in an act, that definition controls the construction of that term. 2A Norman J. Singer, *Statutes and Statutory Construction*, § 47:07 (6th ed. 2000) "As a rule, a definition which declares what a term means is binding on the court." *Id.*

Section 479 of the IRA defines the words "Indian" and "tribe" for the purpose of Section 465 as follows:

> The term 'Indian' as used in sections . . . 465 . . . 476 . . . ***and 479*** of this title shall include all persons of Indian descent ***who are members of any recognized Indian tribe now under Federal jurisdiction***, ...

25 U.S.C. § 479 (emphasis added).

The definition of the word "tribe" expressly incorporates the word "Indian," and provides "[t]he term 'tribe' ***whenever used in said sections*** shall be construed to refer to any ***Indian tribe***, organized band, pueblo or the ***Indians*** residing on one reservation ...." (emphasis added). Where the identical word or phrase is used more than once in the same act, there is a presumption it has the same meaning in all. *Textron, Inc. v. Commissioner*, 336 F.3d at 33; 2A Norman J. Singer, *Statutes and Statutory Construction*, § 47:28, at 357 (6th ed. 2000). Thus, the definition of "tribe" must be read to incorporate the definition of "Indian."

The word "recognized," and phrase "now under federal jurisdiction" contained in 25 U.S.C. § 479, are not defined in the IRA. It is fundamental that unless words are otherwise defined, they "will be interpreted as taking their ordinary, contemporary common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 62 L. Ed. 2d. 199, 100 S.Ct. 311 (1979). Historically under federal law, an Indian group has been treated as "recognized" for federal purposes where:

> (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has some continuing political relationship with the group ....

See Felix Cohen, *Handbook on Federal Indian Law* (1982).

The word "now" is commonly defined as: "1. at the present time or moment .... 3. at this time or juncture in some period under consideration or in some course of proceedings described .... 4. at the time or moment immediately past." *Random House Unabridged Dictionary* (2d Ed.); *Webster's Third New International Dictionary.* ("of or relating to the present time"). Thus, the use of the word "now" in § 479 can only mean in 1934, when the IRA became law.

The word "now" in § 479 is joined with the phrase "under federal jurisdiction," a phrase is not defined in section 479. The phrase "under federal jurisdiction" presumes that the federal government exercised some control or oversight over the Indian tribe. The case of *Alaska v. Native Village of Venetie,* 522 U.S. 520, 140 L. Ed. 2d 30, 118 S.Ct. 948 (1998), provides guidance on what "under federal jurisdiction" was intended to mean. In *Venetie*, the Supreme Court held that the phrase "dependent Indian community" in 18 U.S.C. § 1151 required that two elements be met: that the land be set aside by the federal government and that the land was under "federal superintendence." In explaining what federal superintendence means, the Supreme Court explained:

> The federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.

Alaska v. Native Village of Venetie, 522 U.S. at 531.

The Court's adoption of this standard was based on cases[2] decided between 1913 and 1938, around the time the IRA was enacted in 1934, and required that for land to be considered "dependent Indian community," the federal government would have to have taken some affirmative action to set the land aside for the Indians as well as exercise control, jurisdiction and guardianship over the land at issue. *Id.* at 528-530.

The "now under federal jurisdiction" requirement of § 479 similarly denotes Congress' intent to limit tribal eligibility for land under § 465, to tribes that were recognized and under federal control and jurisdiction.

Thus, applying these concepts and definitions to § 465, it is clear that Congress intended that the Secretary's discretion to take land into trust for Indian tribes be limited to tribes that were recognized **and** under federal jurisdiction **in 1934.**

The Court of Appeals for the Fifth Circuit has adopted this interpretation:

> The language of section 19 [25 U.S.C. § 479] positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe *now* under Federal jurisdiction' and the additional language to like effect.

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[2] The cases are *United States v. Sandoval*, 231 U.S. 28, 58 L. Ed. 107, 34 S.Ct. 1 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. McGowan*, 302 U.S. 535, 82 L. Ed. 410, 58 S.Ct. 286 (1938).

United States v. State Tax Com'n of State of Miss., 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original); *see also City of Sault Ste. Marie, Mich. v. Andrus*, 532 F.Supp. 157 (D.D.C. 1980).[3]

In addition to this plain and unambiguous language, the legislative history of § 465 clearly evinces Congress' intention to limit the Secretary's authority to take land into trust for Indian tribes that existed, were federally recognized **and** were under federal jurisdiction in 1934. *See Negonsott v. Samuels*, 507 U.S. at 106. In fact, the legislative history demonstrates that the "now under federal jurisdiction" language contained in the definition in Section 479 was inserted into the statute for the precise purpose of limiting the reach of the Act to then existing tribes. *See e.g. Chickasaw Nation v. United States*, 534 U.S. 84, 151 L. Ed. 2d 474, 122 S.Ct. 528 (2001).

Passage of the IRA in 1934 reflected a reversal of prior federal Indian land policy, known as the General Allotment Policy, which "authorized the division of communal Indian property" to individual tribal members. *Babbitt v. Youpee*, 519 U.S. 234, 136 L. Ed. 2d 696, 117 S.Ct. 727 (1997); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 254-55, 116 L. Ed. 2d 687, 223 S.Ct. 683 (1991) "Lands not allotted to individual

[3] *cf. United States v. John*, 437 U.S. 634, 57 L. Ed. 2d 469, 98 S.Ct. 2541, (1978) (historical background relied upon by the Supreme Court showed that the Choctaw Tribe had a long history of relations with the federal government prior to 1934).

Indians were opened to non-Indians for settlement." *Id.* at 237. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142, 31 L. Ed. 2d 741, 92 S.Ct. 1456 (1972). The IRA, among other things, reversed the allotment policy by prohibiting the further disbursement of Indian lands, allowed the Secretary to recover lands for eligible Indians, and provided for the establishment of tribally constituted governments.

In testifying before the Senate Indian Affairs Committee, Commissioner Collier responded to questions from committee members about tribal people and federal jurisdiction. In proposing a limitation on the reach of the draft IRA under consideration, he suggested:

> Would this not meet your thought, Senator: After the word "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That **would limit the act to the Indians now under Federal jurisdiction**, except that other Indians of more than one-half Indian blood would get help.

Hearings before Committee on Indian Affairs, U.S. Senate, 73rd Cong. 2d Sess. part 2, p.266 (emphasis added).

The definition of "Indian" adopted by Congress included Commissioner Collier's suggested phrase "now under federal jurisdiction," thereby limiting the reach of the statute. Accordingly, both the language and legislative history of the IRA, confirm the States' interpretation that § 465 applies only to tribes that were recognized and under the federal jurisdiction in 1934.

II. If Section 465 of the IRA Applies to All Indian Tribes, Without Limitation, It Constitutes An Unconstitutional Delegation.

A. The Nondelegation Doctrine

Power is granted by the Constitution to particular institutions within the government and not to the government as a whole. Article I, Section 1 vests legislative powers within the Congress:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Congress alone can exercise the legislative powers "granted herein." It was not granted power to delegate its own power. *Loving v. United States*, 517 U.S. 748, 771, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996).[4] Nor does either of the other branches of government have an independent claim to legislative power. Legislative power may be exercised only by Congress itself.

The Supreme Court recently reaffirmed the vitality of the nondelegation doctrine. In *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457, 472, 149 L. Ed. 2d 1, 121 S. Ct. 903 (2001), the Court found that "[i]n a delegation challenge, the constitutional question is whether the statute has delegated legislative power to an agency." The Court affirmed that the Constitution vested all legislative powers within Congress and that it had repeatedly said that "when

[4] *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002); Peter Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 4 (Cambridge University Press, 1960)(1982).

Congress confers decision making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr. and Company v. United States*, 276 U.S. 394, 409 (1928)).

Mistretta v. United States, 488 U.S. 361, 372-373, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) sets forth the three factors to be applied to determine whether such an "intelligible principle" underlies the delegation of authority. The factors are whether Congress has clearly delineated: (1) the general policy to be applied; (2) the public agency which is to apply it; and (3) the boundaries of the delegated authority. *See South Carolina Medical Ass'n v. Thompson*, 327 F.3d 346, 350 (4th Cir. 2003), *cert denied*, 124 S. Ct. 464 (2003).

B. Section 465 Lacks A General Policy And Intelligible Standards

Applying these standards, it is clear that 25 U.S.C. § 465 fails to set forth an "intelligible principle" sufficient to satisfy constitutional requirements. Section 465 states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated . . . a sum not to exceed $2,000,000 in any one fiscal year . . . .

The statute contains only one of the three *Mistretta* requisites--it identifies the "public agency which is to apply it. It is not constitutionally sufficient because it fails to "delineate the general policy" to be effected and the "boundaries of this delegated authority."

The text of the statute reveals nothing with regard to "policy." It might be argued that the "policy" is to "acquire . . . lands . . . for the purpose of providing land for Indians." This is not a policy, however, it is a tautology. Moreover, the statute assuredly contains no "boundaries" creating an "intelligible principle," especially if read to apply to all tribes, including post-1934 tribes. *See generally South Dakota and Oacoma v. United States Department of Interior*, 69 F.3d 878, 882 (1995), *vacated and remanded*, 519 U.S. 919 (1996).

A finding that 25 U.S.C. § 465 lacks intelligible principles is fully consistent with Supreme Court precedent. In *Panama Refining Company v. Ryan*, 293 U.S. 388, 79 L. Ed. 2d 446, 55 S. Ct. 241 (1935), the statutory scheme provided no guidance for the exercise of discretion, and it was struck down. 25 U.S.C. § 465 contains even less of a standard than *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522, 79 L. Ed. 1570, 55 S.Ct. 837 (1935) which was struck down even though the statute provided that the economy should be stimulated by assuring "fair competition." There is not even that sort of vague standard within 25 U.S.C. § 465. Nor is there a standard such as the "public interest," *see National*

Broadcasting Company v. United States, 319 U.S. 190, 216, 87 L. Ed. 1344, 63 S.Ct. 997 (1993), nor even a standard as vague as "generally fair and equitable." *Yakas v. United States*, 321 U.S. 414, 420, 88 L. Ed. 834, 64 S.Ct. 660 (1944).[5]

C. The Importance of the Trust Land Program Demonstrates The Need for a Statutory Policy and Limits.

In *Whitman*, 531 U.S. at 475, the Court found that the scope of discretion which could be delegated to administrators, consistent with the nondelegation doctrine, was, to some extent, dependent upon the importance and potential impact of the program at issue. Here the potential impact to States is enormous.

As stated infra, p. 1-2, the number of applications for trust land by Indians and the thousands of acres of land already in trust, demonstrates the significance and impact of the impact trust land program. The United States has itself informed the Supreme Court that the land in trust program has a "central role" in Indian policy. Petition for Writ of Certiorari, 95-1956 at 15. It described the Court of Appeal's holding invalidating 25 U.S.C. § 465 as of "fundamental importance," (*id.* at 16) with "great practical significance." *Id.* at 17. The singular importance of the statute, and the pressing need for definitive standards and limitations in the statute, pursuant to *Whitman*, 531 U.S. at 475, is established by the federal government's

[5] Amici note that *United States v. Roberts*, 185 F.3d at 1136-1137 finds no unconstitutional delegation but its brief analysis does not disposed of the matter. *Roberts* fails to cite or analyze the *Mistretta* factors and its abbreviated analysis appears to rely mostly on a generic snippet of legislative history, a practice which is demonstrated above to be impermissible.

own representations. The critical nature of the program for states and tribes demands precise standards under *Whitman*.

D. The Legislative History of the Act Cannot Be Used to Create An Adequate Standard

According to *Whitman*, "When Congress confers its decision-making authority on agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" Legislative history is not a "legislative act." Thus, legislative history cannot be relied upon, consistent with *Whitman*, to find a legitimizing "intelligible principle."

Nor can legislative history be used to establish the *Mistretta* factors. *South Carolina Medical Association*, 327 F.3d at 350, explains that the three *Mistretta* "factors make up the test for determining whether an intelligible principle lies behind the conferral authority from Congress to an agency." *See also Mistretta*, 488 U.S. at 372-373 (same approach). The three factors must, accordingly, be found within the statute itself. First, the language of *Mistretta*, 488 U.S. at 372, demands that "Congress clearly delineate" the three factors. Congress can "clearly delineate" the *Mistretta* factors only in statutory language; Congress is institutionally incapable of speaking clearly in another way. Second, because the "intelligible principle" must be found in the statute itself under *Whitman*, it follows that the "factors [which] make up the test," *South Carolina Medical Association*,

327 F.3d at 350, for the "intelligible principle" must be found in the statute itself.[6] Third, in *South Carolina Medical Association*, 327 F.3d at 351, the court of appeals relied on three quotations from the statutory language itself, including the language of the preamble, and no other sources, to find the three requisite *Mistretta* factors.

III. The Indian Commerce Clause Is Not An Unlimited Source of Congressional Authority.

When the independent sovereign states formed this Nation they "entered the federal system with the sovereignty intact . . . ." *Blatchford, v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S.Ct. 2578 (1991). The Constitution established a National Government with broad, often plenary authority over matters within its recognized competence," however, "the founding document 'specifically recognizes the States as sovereign entities'" *Alden v.*

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[6] A comparison of the original bill as drafted that was not adopted with the final bill that was adopted and became 25 U.S.C. § 465 demonstrates that the statute as passed lacks "intelligible principles". The IRA as originally proposed was a far-ranging, meticulously organized plan for the reorganization and improvement of the Indian tribes and contained standards which most likely could be found to be constitutional. See Addendum A and B attached hereto set out the bill as originally introduced and as ultimately enacted, respectively. (*See.* for the officially printed versions, Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong. 2d Sess. at 1-14 (1934) (hereinafter House Hearings); 48 Stat. 984 (1934). Because Congress deliberately eliminated the intelligible standards from the original bill, it cannot be said that Congress has left room in the language of the act for a narrowing interpretation of 25 U.S.C. § 465 so as to avoid the overbroad delegation in the plain text of the act.

Maine, 527 U.S. 706, 713, 144 L. Ed. 2d 636, 119 S.Ct. 2240 (1999), *quoting Seminole Tribe v. Florida*, 517 U.S. at 71, n. 15. The recognition of the States as sovereign entities is found within the "structure of the Constitution" which contains "essential postulates" in order to maintain our governmental "system of dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19, 138 L. Ed. 2d 214, 117 S.Ct. 2365 (1997).

The purported source of authority for Section 465 of the IRA is the Indian Commerce Clause, which gives Congress the power "***[t]o regulate Commerce with*** foreign Nations, and among the several States, ***and with the Indian Tribes***." U.S. Const. Art. I, § 8, cl. 3 (emphasis added). The States do not dispute that Congress has broad power under the Indian Commerce Clause to legislate in matters impacting "Indian commerce." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 104 L. Ed. 2d 209, 109 S.Ct. 1698, 1716 (1989); *Seminole Tribe v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S.Ct. 1114, 1126 (1996). This being acknowledged, however, the Indian Commerce Clause is not a source of unbridled federal authority relative to the States, and cannot be used to circumvent other equally important constitutional provisions intended to preserve state power and territorial integrity. Here, it is the States' position that Congress' exclusive power, pursuant to the Indian Commerce Clause, to regulate "commerce" ***with Indian Tribes*** does not include the power to remove land from the State's jurisdiction and

control for the purpose of providing land to Indians, without the States' express consent.

Seminole Tribe stands for the proposition that the Indian Commerce Clause was not intended as an unlimited source of Congressional authority with respect to Indian matters and its reach must be viewed in relation to other constitutional limitations on federal authority relative to the States. In *Seminole Tribe*, 116 S.Ct. 1114, the Supreme Court struck down as unconstitutional a provision of the Indian Gaming Regulatory Act, allowing Indian Tribes to sue in federal court, states that refused to negotiate gaming compact.

In this case the Secretary claims the Indian Commerce Clause as the source of Congress' power to enact section 465 of the IRA, and allow her to place land in trust for Indians notwithstanding the rights and interests of the States. It is the States' position that the Indian Commerce Clause is not so broad as to allow the Secretary to take land out of the States' jurisdiction and control without their express consent.

A. The Federal Government's Acquisition of Off-Reservation Land for Indians Under § 465 Without the States' Consent Violates the Enclave Clause of the U.S. Constitution

The Enclave Clause of the United States Constitution, Article I, Sec 8, cl. 1, 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. In particular, the Enclave Clause allows Congress:

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

U.S. Constitution, Article I, Sec 8, cl. 17.[7]

This constitutional provision reflects the founders' respect for the States' territorial jurisdiction and integrity as a fundamental aspect of sovereignty by limiting the authority of the federal government to establish "federal enclaves" over which general state jurisdiction is extinguished. Under this provision such an enclave may only be created upon the express consent of the State Legislature.

> As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism. To this end, the Enclaves Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference with the affairs of the federal government. Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of state land for enclaves. In other words, the Enclave Clause reflects a respect for the autonomy of federal and state governments by equipping Congress with the "sword" of legislative authority and supplying the states with the "shield" of consent.

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[7]Similarly, Article IV, Section 3 of the Constitution expressly prohibits the "involuntary reduction" of the State's sovereign territory

Virginia v. Reno, 955 F.Supp. 571, 576-7 (E.D. Va, 1996) (footnote omitted).

The taking of land in trust by the federal government for Indians outside an original Indian 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. *United States v. Roberts*, 185 F.3d 1125, 1131 *cert. denied*, 529 U.S. 1108 (2000) (10th Cir. 1999); *U.S. v. John*, 437 U.S. 634, 648-649, 57 L.Ed. 2d 489, 98 S.Ct. 2541 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511, 112 L.Ed. 2d 1112, 111 S.Ct. 905 (1991). Unlike acquisitions of the federal government made under its powers found in the Property Clause, U.S. Constitution, Art. IV, Sec. 3, acquisitions for Indian tribes tender significantly different issues. As to ordinary federal properties, state laws may generally apply on federal lands except to the extent they are contrary to federal law. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 49 L. Ed. 2d 34, 96 S.Ct. 2285 (1976). But as to "Indian country" or, some argue, lands held in trust by the United States for an Indian tribe, preemption is presumed against the state, based on the "'semi-independent position' of Indian tribes [which gives] rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). The Supreme Court

explained the two barriers are that such authority may be pre-empted by federal law and such authority may infringe upon the "right of reservation Indians to make their own laws and be ruled by them." *Id.* Such "Indian preemption" is a profound displacement of state authority on Indian lands, yet the Court was referring to Indian reservations. Amici submit that the wholesale acquisition of additional trust land by the federal government for Indians should not be accorded the same preemption presumption; if, in the alternative, it is given such a profound presumption, the acquisition is in the nature of an enclave and requires State consent.

The application of the "Indian preemption doctrine" and related barriers to state regulation on any newly-acquired land for Indians has significant and immediate ramifications for the States' jurisdiction on that parcel. One of the earliest Supreme Court cases stated that "the laws of [a state] can have no force" within reservation boundaries. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *See also Williams v. Lee*, 358 U.S. 217, 219, 2 L.Ed.2d 251, 79 S.Ct. 692 (1959). More recent Supreme Court cases continue to presume that state jurisdiction over Indian country is automatically diminished. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S 520 ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States"); *McClanahan v. Arizona State Tax*

Commission, 411 U.S. 164, 172, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973). As a general rule, absent the tribe's consent or an express congressional authorization, a state cannot exercise certain criminal or civil jurisdiction in Indian country. *See* 25 U.S.C. §§ 1321, 1322; *McClanahan*, 411 U.S. at 171-72, (1973). As to regulatory matters, the federal courts apply a complex balancing test to determine if the state's interests in regulating a matter outweigh the federal government's interest in tribal self-government. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 144-5; *Mascalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973).

Amici submit this diminishment of the State's jurisdiction resulting from the federal government's asserted authority unilateral creation of Indian country within the State creates a federal enclave. Various courts, including the Supreme Court, have described "Indian country" and Indian reservations as federal enclaves. *See United States v. Antelope*, 430 U.S. 641, 648, 51 L.Ed.2d 701, 97 S.Ct. 1395 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n.5 (8th Cir. 1987) (stating that the phrase "within the exclusive jurisdiction of the United States" in 18 U.S.C. 1153" refers to the law in force in federal enclaves, including Indian country."); *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501, *cert. denied*, 502 U.S. 1060 (1992) (7th Cir. 1991) (tax code imposes taxes upon

U.S. citizens through the nation not just in federal enclaves "such as . . . Indian reservations").

The fact that States retain some jurisdiction over some matters in "Indian country" does not, as the district court found, deny the States the protection of the Enclave Clause. It should be sufficient that the wholesale creation of "Indian country" by the Secretary, carving land out of a State, results in a significant ouster of the States' jurisdiction on any single matter or issue, or diminishes the State's jurisdiction in any way.

B. The Approval Of This Trust Acquisition Violates The Tenth Amendment To The United States Constitution.

Section 5 of the IRA violates of the Tenth Amendment because it impermissibly diminishes and infringes on the inherent sovereign rights of the States. The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const., Art. I,§ 8. Under the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited it to the States, are reserved to the States respectively, or to the people." As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292 - 293 (C. Rossiter ed. 1961). . . Moreover, "[j]ust as the separation and independence of the coordinate branches of

the Federal Government serves to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.*" *United States v. Lopez*, 514 U.S. 549, 552, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), *quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (emphasis added).

Section 465 of the IRA undercuts a basic state prerogative, the right of the states to retain powers not specifically enumerated and given to the federal government. The ability of a state to legislate in reference to the land and peoples within its boundaries is fundamental and necessary for its continued independent existence. These elements of political sovereignty are among the essential underpinnings of statehood. The Tenth Amendment confirms and guarantees that understanding. *See E.E.O.C. v. Wyoming*, 460 U.S. 226, 273, 75 L. Ed. 2d 18, 103 S.Ct. 1054 (1983) ("It is clear beyond question that state sovereignty always has been a basic assumption of American political theory.") (Powell, *J.*, dissenting). The Supreme Court remarked long ago that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

25 U.S.C § 465 entrenches upon state sovereignty, because it constitutes a limitless authorization by Congress to effect a major adjustment of the balance of

power between a state and the federal government. Section 465 makes no distinction between the acquisition in trust of a single acre allotment or many thousands of acres. The conversion of vast tracts of land outside designated reservation boundaries, or the creation of a mosaic of trust and fee holdings where jurisdiction was previously uniform, negatively affects the ability and authority of a state to discharge its responsibilities to all of its citizens, non-Indian and Indian alike. The Supreme Court has said that "there is a significant geographical component to tribal sovereignty." *White Mountain Apache v. Bracker*, 448 U.S. at 151. This observation applies with greater force, however, to the states which, unlike the Indian tribes, are constituent constitutional political entities. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92, 104 L. Ed. 2d 209, 109 S.Ct. 1698 (1989); *Bracker*, 448 U.S. at 143.

Application of § 465 of the IRA also transgresses constitutional bounds, because it is not rationally related to the fulfillment of Congress' trust obligations toward this Tribe. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85, 97 S.Ct. 911 (1977). This is particularly true here where Congress, the Tribe and the State of Rhode Island have already determined the extent of this tribes land through the passage of a Settlement Act, agreed to by all of the parties.

Section 465 of the IRA impermissibly overextends and overemphasizes Congress' trust responsibilities toward Indian tribes at the expense of state

sovereignty's rightful place in our constitutional scheme. As the Supreme Court most recently affirmed in *New York v. United States*: "States are not mere political subdivisions of the United States.... The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment." 505 U.S. 144, 2434, 20 L. Ed. 2d 120, 112 S.Ct. 2408 (1992). Therefore, the operation of Section 5 of the IRA has impermissibly infringed the rights retained by the State under the Tenth Amendment. Such inappropriate federal action should be remedied in this case.

CONCLUSION

The District Court's decision should be reversed.

Respectfully submitted,

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