IN THE UNITED STATES COURT OF APPEALSFOR THE FIRST CIRCUIT

C.A. No. 03-2647

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

STATE APPELLANTS' REPLY TO SECRETARY'S RESPONSE TO PETITION FOR REHEARING EN BANC

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I. REPLY ARGUMENT

It is of no surprise to State Appellants that a review of Federal Appellee's (the "Secretary" or "Department") Response reveals that the emperor has no clothes. This Court asked the Secretary to provide any and all evidence in support of a proposition she made for the first time ever at oral argument that "all the Secretaries of the Interior for the last 70 years have read the word 'now' to mean the present, as at the time of a tribe's application." This argument was not even mentioned in any brief filed by the Secretary for good reason – it is totally unsupportable.[1] Likewise, the

[1] As of this date, this Court has not ruled whether to allow Indian Amici to file a second amicus over the objection of State Appellants. If Amicis' motion is granted, the State will seek permission to file a separate response. Suffice it to say, however, that like the Department's *Response*, nothing in Indian Amicis' filing supports their bald assertion that all Secretaries of the Interior have interpreted 'now' to mean the present. The contrary is true. The list of tribes recognized since 1960 and Amicis' logical leap that the Secretary has converted land to trust for them under Section 465 of the IRA (*Amici* at 5-6) falls flat. Many of the tribes on Amicis' list have separate congressional acts authorizing trust. *See, e.g.,* Wampanoag Tribe of Gay Head, Mohegan Tribe of Connecticut, Penobscot and Passamaquoddy Tribes of Maine, Death Valley Timbi-Sha Shoshone Band, Miccosukee Tribe. Tribes on the list from Oklahoma and Alaska were added to the IRA by subsequent congressional acts. Others have no land in trust. *See, e.g.,* Cowlitz Indian Tribe, Lower Lake Racheria, Ione Band of Miwok Indians. Still others were federally recognized and under federal jurisdiction as of 1934 and are, thus, IRA eligible. *See, e.g.,* Jamestown S'Klallam, Grand Traverse Band, and Sault Ste. Marie. The list of federally recognized tribes since 1960 and the individual circumstances of their federal trust land (or lack of it) actually supports the

contention that "trust acquisitions for scores of tribes would be implicated if this Court were to accept State Appellants' argument" is also entirely devoid of legal basis. In sum, the plain language, intent, history, and precedent interpreting Section 479 of the IRA all lead inexorably to the same conclusion; namely, that the IRA does not apply to the Narragansett Indian Tribe. As a matter of law and logic, absent subsequent authorization by Congress, under the 1934 Indian Reorganization Act, the Secretary cannot take land into trust for any Indian tribe that was not both federally recognized and under federal jurisdiction in 1934.[2]

A. There is no Evidence of a Consistent Interpretation by the Department Since 1934 Ignoring the Express Temporal Limitation of the IRA's Section 479

State's position, not the Secretary's.

[2] Indians who meet the 50% "Indian blood" test of Section 479 are also within the IRA. That provision is not germane to this case.

The Secretary asserts that the "historical application of the authority to take lands into trust . . . shows that the Department has consistently interpreted the word 'now' in the first criterion of 25 U.S.C. § 479 to mean at the time of the application of the statute, or, as the panel articulated it, 'today.'"[3] The Secretary, however, *cites not a single tribe* for decades after enactment of the IRA for which the Department has taken land into trust to support this allegedly historical application! On the contrary, the Secretary's response proves the *opposite* is true – for decades after passage of the IRA the "historical application of the authority to take lands into trust . . . shows that the Department has consistently interpreted the word 'now'" in Section 479 to mean what it says; at the time of passage of

[3] The Secretary wrongly claims that the Department's interpretation of Section 479 as containing no temporal limitation "has never been challenged previously, either before the Secretary or before the courts." *Response* at 3. n.1. As shown herein, if true, that would be because until the late 1990s there is no evidence in the historical record that the Secretary ever attempted to read the temporal limitation of Section 479 out of the IRA. Indeed, as recently as 1980, the Secretary had no dispute with the plain reading of Section 479 by State Appellants,"granting this point arguendo . . . and nowhere attempting to refute it." *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980). Moreover, the first time the Department ever took the position in litigation it now takes here was in *Connecticut ex rel. Blumenthal v. United States Dep't of Interior,* 26 F.Supp.2d 397, 399 n.1 (D. Conn. 1999), *rev'd on other grounds*, 228 F.3d 82 (2d Cir. 2000). The State of Connecticut strongly disputed the Secretary's new interpretation of Section 479. The Section 479 issue remained unresolved when the subject tribe later withdrew its trust application. Tellingly, the Department cites neither of these two cases in its *Response*.

the 1934 IRA.[4]

[4] It is certainly worth noting up front that, unlike its practice in many other areas of statutory interpretation, the Department has never even attempted to promulgate an administrative rule or regulation on which tribes are eligible for benefits under the IRA. On the contrary, in 1935, pursuant to the IRA, the Department made a list of all tribes entitled to IRA benefits. *See* discussion of list, *infra*.

The Secretary omits mention of key historic documents *authored* by the Department. The "Report on Purchase of Indian land and Acres of Indian Land in Trust 1934-1975" was commissioned by the Department to determine, *inter alia*, how much land the Department was holding in trust, when it was acquired, and for what tribes.[5] This document, in conjunction with the Department's own list of historic IRA tribes, reveals that with respect to purchases of land by the Department for Indian tribes to be held in trust, the Department purchased such land *only* for historic IRA Tribes though 1975.

[5] Theodore Taylor, Bureau of Indian Affairs, "Report on Purchase of Indian Land and Acres in Trust 1934-1975, Appendix A3. A full copy of this 115 document is publically available at twenty-eight libraries, including Suffolk University Law Library, Law Microforms Drawer 162, title 3322. State Appellants now also possess a full copy, available upon request.

Section 478 of the IRA mandated that the Secretary of the Interior call for an election by existing reservation Indians on whether to opt out of the IRA "within one year of June 18, 1934," *not* within a year some unknown future recognition of a tribe or reservation.[6] To determine which Tribes could vote to opt out of the Act, the Secretary had to determine which tribes were *in* the Act shortly after its passage. Therefore, "a list of 258 tribes was made of all those eligible to participate in voting to reorganize under the IRA or not. As a practical matter, this list can be said to be the constructive 'list' of Indian tribes recognized by the United States in 1934." William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 356 (1990). That list – not revealed to this Court by the Secretary – was compiled and published by the *Department* in 1946. *See* Theodore H. Hass, *Ten Years of Tribal Government Under I.R.A.* (Listing all IRA eligible tribes at Table A of "Indian Tribes, Bands and Communities Which Voted to Accept or Reject the Terms of the Indian Reorganization

[6] Again, the plain language is entirely inconsistent with the notion that the IRA applied to tribes not then recognized or under federal jurisdiction. *See City of Sault Ste. Marie*, 532 F. Supp. at 161 n.6 ("[S]upporting this position is the language of section 478. That this election was to be held only one year after the passage of the IRA suggests that the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

Act, the Dates When Elections Were Held, and the Votes Cast"). This document, available to all at http://thorpe.ou.edu/IRA/IRAbook, was complied by the Department under Interior Secretary Krug and Commissioner Brophy and specifically identified all tribes eligible to vote whether to accept inclusion into IRA.

The combination of the Department's *own* historic documents show that all of the tribes from 1934 through 1975 for whom the Secretary purchased land to be held in trust were IRA eligible tribes. In sum, *the Department's own historical record shows that for the first 40 years after passage of the IRA, the Secretary purchased land to be held in trust only for Indian tribes recognized and under federal jurisdiction in 1934, thus interpreting the 1934 IRA consistent with the express temporal limitation contained in Section 479.*

The Secretary provides no evidence whatsoever to dispute this shocking fact. Indeed, she cites just two recent cases to support her contrary contention. First, she resorts to an IBIA decision, *Baker v. Muskogee Area Dir.*, 19 IBIA 164, 179 (1991) to demonstrate that the Secretary has consistently interpreted "now" to mean "today." *Response* at 3. *Baker* concerned a trust acquisition request by two members of the Cherokee Nation of Oklahoma, a tribe initially excluded from the IRA but later brought under its auspices by a separate act of Congress, the 1936

Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-509. The Oklahoma Act extended the benefits of IRA to Indians living in Oklahoma, including the Cherokee Nation. 25 U.S.C. § 503 (entitling Oklahoma Indians to "any other rights and privileges secured to an organized Indian tribe under the Act of June 18, 1934"). Thus, the only relevant proposition *Baker* stands for is that a tribe not included in IRA as of June 18, 1934 requires express congressional authorization to take advantage of the benefits of IRA.[7]

[7] For the same reason, the Secretary gains no support for her proposition from the Oklahoma Act. The two Solicitor's Opinions cited by the Department to the effect that under the Oklahoma Act a tribe must be "currently existing group distinct and functioning as a group" says nothing relevant to an interpretation of Section 479 of the IRA that an Indian tribe must have been both federally recognized and under federal jurisdiction at the time of that Act's passage to be eligible for its benefits.

The second case cited is *Zarr v. Barlow*, 800 F.2d 1484 (9th Cir. 1986). The case, however, had nothing to do with a temporal limitation in the IRA Section 479,[8] but rather concerned eligibility of an Indian of 1/4 Indian blood for educational benefits under a subsequent federal acts, including the Snyder Act, 25 U.S.C. § 13.[9] To the extent at all relevant here, the Secretary argued *against,* not for, Indian eligibility. In sum, how these two cases in any way support an alleged consistent position of the Secretary since 1934 that Section 479 contains no temporal limitation must remain a mystery.[10]

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[8] In fact, the Sherwood Valley Band of Pomo Indians was on the list of Tribes under the IRA in 1934. Hass, *Ten Years of Tribal Government* at Table A (Sacramento Agency).

[9] The Court held that "neither the [IRA] as amended by the Indian Financing Act, 25 U.S.C. § 1452, nor the Snyder Act, 25 U.S.C. § 13, provides authority for the BIA's continued application of a one-quarter degree Indian blood quantum eligibility requirements for Indian higher education grants under 25 C.F.R. § 40.1." 800 F.2d at 1493-94.

[10] The Secretary attempts to rebut the common sense point that if Congress wished to include Indian tribes that in the future became recognized and under federal jurisdiction, it could have said so by removing the word "now" or adding the words "or hereafter" to Section 479's definition. *Response* at 4, n2. As explained in prior briefing to this Court, the temporal limitation was part of an amendment to Section 479 worded by the Commissioner of Indian Affairs at the request of the cosponsor of the IRA to "recognize[] the status quo of the present reservation Indians" eligible for IRA inclusion. *State Reply* at 18. It has nothing to do with ensuring that Tribe's that "have passed out of existence are not covered by the Act." A tribe that is terminated by Congress is entitled to any federal benefits or programs, including the IRA. *See, e.g., United States v. Felter*, 546 F. Supp. 1002, 1004 (D. Utah 1982). The Secretary states that the

addition of “or hereafter” in Section 479 “would suggest that individuals could be *currently* entitled to benefits as ‘Indians’ on the basis of speculative *future* events, an anomalous outcome.” *Response* at 4 n.2. Whatever this means, as a matter of statutory construction, the addition of these words would have lifted the temporal restriction and allowed tribes recognized and placed under federal jurisdiction *after* passage of the IRA to come within the IRA, but *not* until those two criteria were met.

Finally, the Secretary claims again that "[i]n the years since the IRA was adopted, the Secretary has exercised [trust taking power] on behalf of any tribe currently under federal jurisdiction, regardless of the date on which it was first recognized." *Response* at 5. The State-Appellants ask, where's the beef? The Secretary cites only two alleged examples of this so-called practice. The first concerned a trust taking for the Jamestown S'Klallam Tribe of Washington that occurred in the 1980s, some 50 years after passage of the IRA. While the Department claims that this Tribe was first recognized in 1981, that Tribe entered into the "Point No Point" treaty with the United States in 1855 and received federal land and benefits under that treaty through 1953, when they were detribalized. They are also part of the "Clallum" tribe on the 1934 Act eligible list of tribes compiled by the Department. They are, therefore, an IRA tribe and not a "later-acknowledged tribe."[11]

[11] Recognition can occur through "a formal treaty, the mention of the tribe in a statute, or a consistent course of administrative conduct." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 656 (D.Me. 1975).

The only other example of historical interpretation cited by the Department[12] concerns 1970s trust acquisitions for the Sault Ste. Marie Tribe of Michigan, some 40 years after the passage of the IRA. Even this trust acquisition cannot support an interpretation by the Secretary that there is no temporal limitation in Section 479. That is because when the trust acquisition was challenged, the Secretary assumed that such a temporal limitation did in fact exist, "granting this point arguendo . . . and nowhere attempting to refute it." *Sault Ste. Marie,* 532 F.Supp.2d at 161 n.6. Moreover, the Court held that the tribe was, as a matter of law, federally recognized as of March 28, 1836 by virtue of a treaty it entered

[12] As a post-1934 historical example, the Department was unable to find even a single "east coast tribe" to which its position applied. In footnote 4 of its *Response*, the Department was to "get from Tom" such a Tribe, but never did so. This is not surprising considering that the dean of Indian law, Professor Felix Cohen, disagreed with the position now espoused by the Department, while he was Assistant Solicitor of the BIA. *See* Reply brief at 17 n.18.

into with the federal government. *Id.* at 161.[13] Again, the Sault Ste. Marie was an IRA tribe under the plain language of Section 479.

[13] While the Secretary correctly points out that numerous tribes have been recognized by the Department and Congress since 1934, that is not the issue. The question is whether those newly-recognized tribes are IRA tribes entitled to jurisdiction-stripping trust acquisition of land by the Department.

In her continuing attempt to make factual that which is not, the Secretary proclaims that "[w]hile no single compilation all of [sic] the land transactions the Secretary has entered into on behalf of later-acknowledged tribes exists, it is *unquestionable that the Secretary has acquired lands for tribes across the nation on the understanding that trust land acquisition is authorized for all currently recognized tribes.*" *Response* at 5 (emphasis added).[14] On the contrary, not only is that proposition "questionable," but it has been questioned by State Appellants, and more importantly this Court. In response to the question, the Department has come up empty handed. In this Reply, State Appellants, using the Department's own historical documents reveal why – as vividly shown above and by the Department's own inadequate *Response*, the notion that the Department had a "longstanding administrative interpretation" that there is no temporal limitation in Section 479, *Response* at 6, has now been proven to be nothing but popular mythology, entirely devoid of any factual basis. The truth is that the Department's position flies in the face of the historical record of trust taking since 1934 – its position that "now"

[14] While it may be understandable that "no single compilation exists," it is difficult to understand why the Department has no idea of how much land it owns in trust and for what tribes, or that State Appellants are better versed in the history of the tribes cited by the Department than is the Department.

means "whenever" in Section 479 is of very recent departmental vintage.[15]

B. The IRA's Text and History are Four Square Contrary to the Department's New Position

[15] The Department attempts to scare the Court by claiming that enforcing Section 479's temporal limitation would "call[] into question" the United States' prior trust acquisitions. The Department, however, has successfully argued its position that the federal Quiet Title Act would preclude reversion and acknowledges this. *Response* at 6 n.5; *see also Department of the Interior v. South Dakota*, 519 U.S. 919, 920-91 (1996). The Department then claims that it would preclude future trust acquisitions for newly-recognized tribes. It would do no such thing. Congress has expressly authorized such acquisitions for many of the tribes not among the 278 historic tribes included in the IRA in 1934. Such tribes also remain free to purchase as much land in fee as they desire and to create nonprofit entities to govern activities such as housing on the land to be free from local property taxes.

The Department still clings to the notion that the purpose of the IRA supports sidestepping the temporal limitation of Section 479. It does not. The State Appellants rebuffed that argument on pages 6-9 of their Reply Brief and will not rehash that argument here. The same is true for the text of the Act, which the Department attempts to turn on its head. *See State Reply Brief* at 9-12.[16] Finally, the intent of the drafters of the temporal limitation to preserve the "status quo" of tribes eligible for inclusion in the IRA, by limiting its application to tribes then under federal jurisdiction and federally recognized was exhaustively briefed at pages 16-20 of State Appellants' Reply Brief. The Secretary, unable to rebut the historical facts

[16] The Secretary also argues that applying the temporal limitation to the IRA would interfere with her ability under 25 U.S.C. § 467 to "proclaim new reservations." *Response* at 8. She fails to quote the language of that statute, however, which merely authorizes her "to proclaim new Indian reservations on lands acquired *pursuant to any authority conferred by this [IRA] Act . . .*" (emphasis added). Thus, far from supporting the Secretary's reading of the IRA as carte blanche authority to convert land to trust for any and all Indians, this section further demonstrates that her power to administratively convert such land is limited to those Indian tribes that are IRA eligible in the first place.

contained therein – including the views of IRA cosponsor Senator Howard, BIA Commissioner Collier and the dean of Indian law, Felix Cohen – chooses simply to ignore them.

C. Later Congressional Action and Inaction Support the IRA's Temporal Limitation

The Secretary states that "Congress has never expressed concern that the Secretary has taken land into trust for tribes recognized after 1934, despite its awareness of the Secretary's action." *Response* at 10. Of course not. How could *Congress* possibly "express concern" or have "awareness" that the Department is taking land into trust for Tribes not recognized in 1934 when the Department itself has provided no evidence that it has ever done so, never mind "consistently interpret[ing] the land acquisition authority of [the IRA] to apply to newly-recognized tribes." *Response* at 12. The truth is that Congress, despite amending the IRA on several occasions, has refused to change one word, including the temporal limitation, of Section 479, and until recently, the Department itself has not taken the position that it may by administrative action read the congressional mandate out of the Act.

The Department cites two later post-IRA acts of Congress as somehow removing the temporal limitation; one, the 1983 Indian Land

Consolidation Act,[17] 25 U.S.C. 2202 (the "ILCA"); and two, the "Federally Recognized Indian Tribe List Act," Pub L. 103-454, 25 U.S.C. § 479a (1994) (the "List Act").[18] State Appellants exhaustively rebut any argument that either somehow erased the temporal limitation contained in Section 479 on pages 21-27 of their Reply brief, and briefly discuss these two Acts here.

[17] The Department never even mentioned the ILCA in its brief to the panel.

[18] The Department also cites a 1994 amendment to Section 476 if the IRA allegedly "prohibiting the Secretary from distinguishing among recognized tribes with regard to the privileges and immunities afforded such tribes." *Response* at 10. The State Appellants rebut this contention on pages 22-23 of their Reply brief. In short, it was Congress, not the Secretary, that placed a temporal limitation in Section 479, and Congress has routinely treated different tribes differently, especially newly-recognized tribes in Settlement Acts with States. The Secretary is not only authorized to respect Congress' temporal limitation, she is obligated by law to do so.

The addition by Congress of certain specific tribes to the scope of the 1934 Act decades after its passage is entirely inconsistent with the notion of the Department that all tribes, regardless of the date of recognition, are automatically included in the IRA as soon as they become federally recognized. Although Congress passed two laws specific to the Narragansetts (in 1978 and 1996), unlike these tribes, it has never added them to the scope of the IRA. The Department tries to pooh-pooh this logic by claiming that these specific acts "clarify the extent to which the statutes in which they appear *limit* the IRA's application to these tribes." *Response* at 12 (emphasis in original). Hardly. The truth is that the Secretary simply has no explanation for the numerous congressional acts that make the IRA applicable to a tribe *in the first place* (using words like "the IRA is hereby made applicable"), without any recognition that the Act somehow already applies, and is now being limited by Congress.[19]

[19] To cite just a few from State Appellants' Reply brief: *Hoopa-Yurok Settlement Act*, 100-580 (1988) ("The Indian Reorganization Act of June 18,1934, as amended, is hereby made applicable to the Yurok Tribe and the tribe . . . "); *Coquille Restoration Act*, Pub. L. No. 101-42 (1989) ("Indian Reorganization Act Applicability.–The Act of June 18, 1934, as amended, shall be applicable to the Tribe and its members.").

D. The Department's Attempt to Square the Panel Decision with Existing Precedent is Unavailing

The State Appellants explained in their petition for rehearing en banc how the panel decision conflicted with the Fifth Circuit's decision in *United States v. Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of [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." (emphasis in original)). The Secretary says nothing to refute this.[20]

II. CONCLUSION

This Court asked the Department for any and all support it had for the proposition that the Department had for the last 70 years interpreted "now" to mean "today." It was provided with none. Nor would trust acquisitions be undone retroactively or eliminated prospectively if authorized by

[20] Indeed, the Department now agrees that "the Supreme Court held . . . that the [IRA] authorized the Secretary to hold the Choctaw lands in trust, because the IRA authorized the trust acquisition of lands for Indians of 'one half blood or more.'" *Response* at 13. As such, it indicated no disagreement with the Fifth Circuit's interpretation of the prong of Section 479 at issue here as having a clear temporal limitation. Indeed, the Supreme Court itself expressly indicated that with regard to federal jurisdiction and recognition for entry into IRA, *now* means *1934.* There can be no question that the panel decision's holding that there is no temporal limitation in Section 479 is in conflict with both the Supreme Court and the Fifth Circuit on this very point.

Congress. The petition for en banc consideration should be granted for the reasons stated in that petition and herein.

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DATED: July 11, 2005

CERTIFICATE OF SERVICE

I hereby certify that caused to be forwarded a copy of the within Reply Brief via e-mail and regular mail, postage prepaid, to Elizabeth Ann Peterson Appellate Section Environment & Natural Resources Division, Room 8930 Department of Justice, PO Box 23794 L'Enfant Station, Washington, D.C. 20026; and to Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI 02903 on the 11th day of July 2005.