UNITED STATES COURT OF APPEALS FOR 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, 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

Defendants-Appellees

On Appeal from a Judgment of the United States District Court for the District of Rhode Island

EN BANC SUPPLEMENTAL BRIEF OF STATE APPELLANTS

GOVERNOR DONALD L. CARCIERI
By His Attorney,

Claire Richards (#32606)
Special Counsel
Room 119, State House
Providence, RI 02903
(401) 222-8114

STATE OF RHODE ISLAND
By Its Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

Neil F.X. Kelly (#53595)
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2284

TOWN OF CHARLESTOWN
By Its Attorney,

Joseph S. Larisa, Jr. (#47027)
Assistant Solicitor for Indian Affairs
Town of Charlestown
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

DATED: December 26, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

I. INTRODUCTION

There is no more important question concerning the nature and extent of the State's sovereignty than the one presented by this case – whether, for the first time in Rhode Island history, the full application of the State's civil and criminal laws and jurisdiction can be withdrawn anywhere within its borders through the creation of Indian country.[1] The lower court's decision permitting the Secretary of the Interior to take land into unrestricted trust for the Narragansett Indian Tribe under section 465 of the Indian Reorganization Act must be reversed for three powerful reasons.

First, by its plain language, section 465 of the IRA does not apply to the Tribe; the IRA permits the Secretary to convert land to trust only for those Indian tribes that were both federally recognized *and* under federal jurisdiction in 1934. Since it is undisputed that the Narragansett Indian Tribe was not both federally recognized and under federal jurisdiction in 1934, section 465 cannot and does not authorize the Secretary to take land in trust

---

[1] Not at issue, of course, is the only place in Rhode Island where this Court has ruled that the State's civil and criminal laws and jurisdiction are *fully* applicable: the Settlement Lands comprising the very heart of the Tribe's ancestral home. Also not at issue here is the Tribe's right to construct low income housing for its members on the Parcel. Indeed, the State and Town are on record as supporting the project. It is undisputed that there is no HUD or other federal requirement that the Parcel be converted to trust for the housing project to be completed.

for the Tribe. State Appellants spend 79 pages of prior briefing detailing this compelling legal conclusion and fully rebutting the arguments of the Federal Appellees and Amici to the contrary.

Second, the Settlement Act separately prohibits the ouster of state jurisdiction that is the hallmark of federal trust conversion under section 465. The Settlement Act precludes such an ouster with a powerful two-pronged extinguishment: by extinguishing aboriginal title throughout Rhode Island and by extinguishing all claims by any tribe (including the Narragansetts or any "successor in interest") based on "any interest in" or "right involving" land in Rhode Island. These two extinguishments – separately and together – prevent the Secretary from converting land in Rhode Island to federal trust for Indians. Another provision of the Settlement Act additionally prohibits the eclipse of State sovereignty by barring the United States from any further land-based duties or liabilities to the Tribe. Since one of the primary land-based responsibilities owed to an Indian tribe by the United States is to hold land in trust, this provision, if it is to mean anything at all, must mean that the Secretary cannot convert land in Rhode Island to trust for the Tribe.

Third, State Appellants argue that placing the Parcel into trust violates the sovereignty of the State under the Constitution of the United States. The

Secretary points out that the purpose of imposing the trust is to prohibit the State's application and enforcement of its civil and criminal laws and jurisdiction on the land. Neither the Constitution, nor principles of federalism provide the Secretary with the authority to rip the State's sovereign jurisdiction from the land without consent in light of the Article I, the Enclave Clause, and Art. IV, § 3 of the Constitution.

Recent developments have strengthened State Appellants' position in this case. First, in *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (1st Cir. 2006) *cert. denied* 2006 WL 2725697 (Nov. 27, 2006), this Court confirmed that on the Settlement Lands – the heart of the Tribe's ancestral home – State civil and criminal laws apply and can be fully enforced. Second, in *Sherrill v. Oneida Indian Nation,* the United States Supreme Court confirmed another key tenet of State Appellants' argument: that the exercise of territorial sovereignty, to the exclusion of state laws, is an inherent attribute of aboriginal title. 544 U.S. 197 (2005). *Sherrill* thus supports the proposition that when aboriginal title is extinguished on land, so too is the potential for the exercise of Indian sovereignty[2] over that land.

[2] State Appellants have consistently argued that the extinguishment of tribal sovereignty over *land* does not extinguish the Tribe's inherent sovereignty

II. ARGUMENT

Due the bulk and comprehensive nature of briefs previously filed in this case and for the convenience of the Court and parties, State Appellants Supplement their major arguments and briefly rebut points raised by the Secretary in a previous reply brief to which the State Appellants did not have the opportunity to respond.

A. Fairly Interpreted, the IRA Cannot Apply to the Tribe

State Appellants have – on six separate occasions – comprehensively demonstrated that as a matter of law, logic and history the 1934 Indian Reorganization Act does not apply to the Narragansett Indian Tribe. *See*, St. Opening Br. at 20-28; St. Reply Brief at 2-30; St. Pet. Rehearing (I) at 5-14; St. Reply to Secretary's Response to Petition for Rehearing at 1-15; St. Resp. to Indian Amici at 3-14; St. Pet. Rehearing (II) at 6-14.

While State Appellants could regurgitate their argument here, there is no need to do so. A review of the 79 pages of memoranda previously filed in support of this argument show beyond peradventure that the text, structure, intent and history of the Act itself (including the Secretary's interpretation of it) lead to the inexorable conclusion that the Parcel may not be taken into

---

over its members and its internal governance as defined in Narragansett Indian Tribe. *See supra.*

it) lead to the inexorable conclusion that the Parcel may not be taken into trust by the Secretary under the IRA because the Tribe was not both federally recognized and under federal jurisdiction in 1934. Since the last brief filed by State Appellants, there have been no court decisions or legislative enactments casting any doubt on this conclusion.

B. The Settlement Act Necessarily Prohibits an Ouster of State Jurisdiction

The Secretary tries to limit the reach of the Settlement Act only to the Settlement Lands by asserting that "[t]he text of the Settlement Act plainly contains no restriction on tribal sovereign authority outside the Settlement Lands." Fed. Appellees' Reply at 3. This circumscribed reading of the Settlement Act ignores three powerful provisions of the Settlement Act specifically designed to preserve the State's sovereignty everywhere within its borders.

1) Extinguishing Aboriginal Title Prevents the Reinvigoration of Indian Land-Based Sovereignty in Rhode Island

The Settlement Act extinguished aboriginal title on *all* land within Rhode Island. 25 U.S.C. §§ 1705(a)(2) and 1712(a)(2). State Appellants have cited cases from 1877 to 2005 standing for the proposition that aboriginal

title is the basis for and source of Indian land-based sovereignty.[3] The effect of a wall-to-wall extinguishment of aboriginal title is to prohibit prospectively the exercise of tribal sovereignty over land in Rhode Island. When the Secretary converts land to unrestricted trust for Indian tribes in Rhode Island, he defies the will of Congress and the carefully-negotiated safeguards of state sovereignty set forth in the Settlement Act because such a trust conversion revives the very ability to exercise land-based sovereignty that the Settlement Act has specifically extinguished.

A recent decision of the United States Supreme Court confirms the State's interpretation of aboriginal title and, by logical extension, the effect of its extinguishment. In *Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), the Secretary[4] and the Oneida argued that the Oneida's fee simple purchase of land within the boundaries of their ancient reservation "unified fee and aboriginal title and [the Oneida] may now assert sovereign dominion over the parcels." *Id.* at 213 *citing* Brief of the United States as Amicus Curiae at 9-10.

---

[3] St. Opening Br. at 34-36; St. Reply at 37-39; St. Pet. Rehearing (I) at 4, 20-23; St. Supp. Br. 3-8; St. Pet. Rehearing (II) at 17-18.

[4] Notwithstanding his cramped interpretation of aboriginal title espoused in this case, the Secretary championed a far broader interpretation – and one completely consistent with that of State Appellants – as an *amicus* party in *Sherrill, see infra.*

The Court's rejection of this "unification" theory was based not on any disagreement with the Secretary or the Oneida over the sovereignty value of aboriginal title, but because of the doctrine of laches. *Id.* at 217-221. In reading its conclusion, the Court accepted two of State Appellants' central arguments: 1) that aboriginal title effects an ouster of state and local jurisdiction (sovereignty) in favor of tribal and federal jurisdiction (sovereignty) and; 2) that conversion of land to unrestricted federal trust for an Indian tribe effects precisely the same effect. When the Settlement Act extinguished aboriginal title to all land within the State, it precluded the reinvigoration of Indian land-based sovereignty here by any administrative means.[5]

[5] The Secretary believes that *Sherrill* actually supports the view that he may freely convert land to trust in Rhode Island under section 465 since, in that case, the Court observed: [s]ection 465 provides the proper avenue for [the Oneida] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221. The critical difference, completely ignored by the Secretary, between *Sherrill* and this case is that there is no settlement act extinguishing aboriginal title and all other claims in New York. The presence of such a congressional extinguishment in Rhode Island prohibits unrestricted trust conversions under section 465. The absence of similar congressional extinguishments leaves open the possibility of conversions under section 465 for eligible tribes in New York.

2) Barring Claims Based on any Interest in or Right Involving Land in Rhode Island Precludes Unrestricted Trust

Although he kicks up a lot of dust arguing about the meaning of aboriginal title, the Secretary virtually ignores the Settlement Act's second, broader extinguishment of "any interest in" or "right involving" land in Rhode Island. 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). If, as the Secretary contends, extinguishing aboriginal title merely terminates a right to "occupy" land, then as a matter of law and logic, this greater extinguishment of "interests in" and "rights involving" land must extinguish other rights and interests in land beyond mere occupancy, including claims of Indian sovereignty over land.[6] *Accord* Joseph William Singer, Nine-Tenths of the Law: Title, Possession & Sacred Obligations, 38 Conn. Law Rev. 605, 608 (2005) (noting that Indian sovereignty is a "claim" based on the transfer of title); *see also* Brief for Petitioner (State of Alaska) in *Alaska v. Native Village of Venetie Tribal Gov't,* located at 1996 U.S. Briefs 1577 at n. 23 (in which the State of Alaska, represented by now Chief Justice John G. Roberts, Jr., argued that ANCSA's similar "all claims" extinguishment precluded land-

[6] This position is extensively briefed at St. Opening Br. at 36-37; St. Reply at 39-41; St. Pet. Rehearing (I) at 16; St. Supp. Br. 8-10; St. Pet. Rehearing (II) at 19-20.

based sovereignty or "Indian country" in Alaska). The Secretary halfheartedly argues that this broader extinguishment simply addresses various "subsidiary" claims of aboriginal title, like trespass. Fed. Reply to St. Supp. Br. at 10. This argument is a non-starter. Even under the Secretary's own pinched view of aboriginal title, trespass and other claims "subsidiary" to aboriginal title would be completely wiped out by the extinguishment of aboriginal title itself. Other than reducing it to surplusage, the Secretary does not attempt to rebut the argument that this "all claims" extinguishment bars claims of Indian sovereignty over land in Rhode Island. That is because there is no other plausible explanation for it.

3) The United States is Separately Barred from Eclipsing State Sovereignty on Behalf of any Indian Tribe

The Settlement Act expressly prohibits the United States from eclipsing the State's sovereignty on behalf of any Indian tribe by applying the broad extinguishment provisions not just to Indian tribes but also to their "successors in interest." 25 U.S.C. §§ 1705(a)(3); 1712(a)(3). Of course, when the Secretary takes land in trust for the Tribe, he becomes the Tribe's "successor in [fee title] interest" and is, therefore, confronted with precisely the same bar faced by the Tribe.

Additionally, the Settlement Act bars the United States from any "further duties and liabilities" under the Settlement Act with respect to the Tribe. 25 U.S.C. § 1707(c). Since the Settlement Act extinguishes all Indian claims to land in Rhode Island, this section bars the federal government from further *land based* duties to the Tribe. This section is another plain and unambiguous limitation on the Secretary's ability to convert land to trust for Indian tribes in Rhode Island.[7]

Each of these provisions – the extinguishment of aboriginal title, the extinguishment of all other "rights" and "interests" in land (both by Indian tribes and by their successors) in interest and the prohibition against further federal land-based duties and liabilities to the Tribe – clearly demonstrate that the Tribe's asserted right to or interest in exercising territorial sovereignty in Rhode Island has been foreclosed by Congress outside the Settlement Lands just as it has been within the Settlement Lands.[8]

---

[7] State Appellants' position on this "stay away" provision of the Settlement Act was fully briefed at: St. Opening Br. at 38-39; St. Reply at 41-43; St. Pet. Rehearing (I) at 16-17; St. Pet. Rehearing (II) at 20.

[8] State Appellants also argue that the terms of settlement of the 1976 Lawsuits themselves dictate that the Parcel shall remain subject to the State's civil and criminal laws and jurisdiction. State Opening Br. at 54- 56; State Reply at 42-43; St. Pet. Rehearing (I) at 20-23; St. Supplemental at 12-15; St. Pet. Rehearing (II) at 22-24. The Secretary argues (Fed. Br. at 20-21) that

4) Any Trust Must Preserve State Law and Jurisdiction on the Parcel

In response to a May 26, 2005 Order from this Court, State Appellants explained how even if the Secretary were permitted to take additional land into trust for the Tribe, that trust must be restricted to preserve the State's civil and criminal laws and jurisdiction.[9] As State Appellants explained in that Supplemental Brief, the only way to harmonize the IRA with the state sovereignty safeguards of the Settlement Act (and the terms of the settlement of the Lawsuits themselves) is to have any trust land so converted be subject to the State's civil and criminal laws and jurisdiction, precisely the same jurisdictional regime as currently exists on the Settlement Lands.[10]

Such a restricted trust retains the Secretary's IRA-based trust ability, permits the Tribe to be free from property taxation on trust land and the

---

settling the lawsuits resolved only claims of Indian *possession* of land in Rhode Island, not claims of Indian (and federal) *jurisdiction* over land there. The argument is nonsensical since Indian (and federal) jurisdiction over land flows directly from Indian possession – and trust conversion – of that land.

[9] St. Supp. Br. dated June 15, 2005.

[10] Placing the Parcel in trust subject to the State's civil and criminal laws and jurisdiction may well leave open an important question. That is because a trust, even so restricted, may nonetheless not foreclose a threshold determination of IGRA eligibility. 25 U.S.C. §2701 *et seq.* A determination that the Settlement Act precludes any trust conversion, on the other hand, ends the IGRA inquiry.

wall-to-wall application of the State's laws and jurisdiction would remain intact as Congress intended in the Settlement Act.[11]

C. The Constitution and Principles of Federalism Protect the State's Sovereign Jurisdiction

The Constitution and principles of federalism preclude the Secretary from taking land into trust for another sovereign in an unbridled manner. The State relies on the arguments made in the State's Opening Brief at 58-76 and in its Reply Brief at 54-68.[12] Article I, § 8, cl. 3, the Indian Commerce Clause, does not provide the Secretary with the authority to strip a State of its sovereignty, here the State's jurisdiction. In addition, the Enclave Clause, Article I, § 8, cl. 17 and Article IV, § 3 of the United States Constitution

---

[11] Throughout the course of this litigation, the Secretary has steadfastly maintained that he cannot (or, perhaps it is only that he will not), convert land to trust subject to restrictions, like the preservation of state law and jurisdiction. Of course, the Secretary had no problem converting the Settlement Lands to trust subject to the restriction that the State's civil and criminal laws were fully applicable there, a restriction that also appears on the Secretary's own acceptance of the deeds passing the Settlement Lands from the Tribe to the Secretary.

[12] The Supreme Court has recently denied certiorari in two cases challenging the trust authority pursuant to 25 U.S.C. § 465 on non-delegation grounds, *Utah v. Shivwits Band of Paiute Indians,* 428 F.3d 966 (10th Cir. 2006) *cert. denied*, 2006 WL 622231(October 2, 2006); and *South Dakota, et al. v. Department of Interior,* 423 F.3d 790 (8th Cir. 2006) *cert. denied*, 2006 WL 1520764 (October 2, 2006).

make it incumbent on the Secretary to obtain the state's consent before imposing an unrestricted trust in Rhode Island.

The Secretary diverts the focus from the critical inquiry under the Enclave Clause of whether the federal government has extended exclusive legislative jurisdiction over the land to one that looks only at whether the state has any authority left. Fed. Reply Br. at 32-35. What is clear is that whatever residuum of state jurisdiction that is left exists at the sufferance and will of Congress. The Constitutional prohibition centers on whether the federal government assumes "exclusive legislative authority" over the subject land. The Secretary has failed to address that point.

The relevant inquiry is whether the United States has acquired "exclusive legislative authority so as to debar the State from exercising any legislative authority including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory." [13] *Silas Mason Company v. Tax Comm. of Wash.*, 302 U.S. 186 (1937). Taking

---

[13] The Secretary's own regulations state that, "none of the laws...of any state...shall be applicable" to land that is held in trust for a tribe by the United States. 25 C.F.R. § 1.4(a). St. Opening Br. at 66, n. 33. In fact, the Secretary steadfastly asserts that "Tribal sovereignty . . . inheres in tribes and operates to exclude some aspects of state sovereignty on Indian reservations and other lands occupied by federally recognized Indians, defined in federal law as 'Indian country.'" Fed. Reply to St. Supp. Br. at 8 n. 5.

land into unrestricted trust pays lip service to the Constitutional prohibition against assuming exclusive legislative authority on land without consent.

The Secretary also failed to address either the prohibition in Article IV, § 3 that "no new State shall be formed or erected in within the Jurisdiction of any other State" or the Supreme Court's definition that a "state" exists where there is "a people, a territory, and a government." St. Opening Br. at 69. The Secretary's reliance on *Coyle v. Smith,* 221 U.S. 559 (1911) is misplaced. Fed. Br. at 36

The proper focus is not on what the Admissions Clause allows, but rather on what it prevents the federal government from doing. The Secretary concedes the State's central points by saying that Indian tribes are "self governing political communities," and that federally recognized tribes enjoy a "government to government relationship with the United States." Fed. Reply to St. Supp. Br. at 8 n 5.

The Constitution prohibits the creation of a "state" beyond the reach of state law and jurisdiction for another sovereign under the protection of federal law without consent.

III. CONCLUSION

For the reasons set forth herein and in State Appellants' other Briefs and Petitions filed in this case, and as well as may be adduced at oral argument, the decision and judgment of the District Court must be reversed and the case remanded for entry of judgment in favor of State Appellants.

Respectfully Submitted,

DONALD L. CARCIERI, in his Capacity as Governor of the State of Rhode Island and Providence Plantations

By His Attorney,

Claire Richards, #32606
Special Counsel
Room 119, the State House
Providence, RI 02903
(401) 222-8114
(401) 222-8091 Fax

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

By Its Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

Neil F.X. Kelly, #5[illegible]95
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
(401) 222-2995 Fax

TOWN OF CHARLESTOWN

By Its Attorney,

Joseph S. Larisa, Jr., #[illegible]7027
Assistant Solicitor
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700
(401) 633-6296 Fax

Dated: December 26, 2006

CERTIFICATION

I hereby certify that I mailed a true and accurate copy of the within Petition for Rehearing via regular mail, postage prepaid, to Elizabeth Ann Peterson, Appellate Section Environment & Natural Resources Division, Department of Justice, P.O. Box 23795, L'Enfant Station, Washington, DC 20026 and Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI, 02903 on the 26th day of December, 2006.

Claire Richards