IN THE 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,
a sovereign state of the United States of America,
and TOWN OF CHARLESTOWN, RHODE ISLAND,

Plaintiffs-Appellants

v.

DIRK KEMPTHORNE, in his
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

POST EN BANC ORAL ARGUMENT BRIEF OF STATE APPELLANTS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary has been provided with a final chance to direct the Court to historical information supporting his contention that the Bureau of Indian Affairs has had a consistent "administrative practice" of taking fee land into federal trust for tribes that were neither "members of any recognized [in 1934] tribe now under federal jurisdiction," *United States v. John*, 437 U.S. 634, 649 (1978)[1] (bracket in original) nor "persons of one half or more Indian blood," *id.*, in the absence of separate specific authorizing legislation by Congress.

This additional opportunity follows briefing by the Secretary and Amici (collectively "Opponents") in which they tried to support their contention (adopted by the federal government for the first time at oral argument before the Panel) that "all Secretaries of the Interior for the last 70 years have read the word 'now' to mean the present, as at the time of the tribe's application"

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[1] While Opponents at oral argument attempted to pass off *John's* teaching as mere dicta, State Appellants explained why if it is not a holding, it is nevertheless controlling here. This Court has also noted that "[A]ppellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *Rossiter v. Potter*, 357 F.3d 26, 31 n.7 (1st Cir. 2004). Not even Opponents claim that *John* has been enfeebled.

and that "trust acquisitions for scores of tribes would be implicated if this Court were to accept the state appellants' argument."

The State Appellants showed then that the historical record does not support the theory that the Secretary consistently disregards the temporal limitation of the IRA. On the contrary, State Appellants demonstrated that the Secretary consistently observes the temporal limitation when converting land to trust for Indians. *See* Reply to Secretary's Response to Petition for Rehearing En Banc (7/11/05); Response to Amici Curiae (8/23/05). While both the Secretary and Amici append a stack of papers to their latest memoranda, more pages simply cannot overcome the weight of the true historical record post-passage of the 1934 Act.[2]

> *First*, for the first 27 years after passage of the Act, neither the Secretary nor Amici even attempt to cite a single tribe for which land

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[2] Amici state that they disagree "with the importance that the State places upon this inquiry of administrative practice." Post Argument En Banc Brief of Amici ("*Amici*") at 1. The State Appellants, however, have never claimed that the Secretary's administrative practice has any import in light of the plain language and history of the temporal limitation and until oral argument before the Panel, neither did the Secretary. It is only the Secretary's false claim at oral argument (coaxed by Amici) of 70 years of administrative practice of trust taking for non-IRA tribes that prompted the Court's inquiry in the first place. It was then the Secretary's burden to prove a consistent administrative practice of trust taking, without regard to the temporal limitation in the Act, and he has failed. Even if there were such practice (and there was not), neither it nor a regulation omitting the temporal limitation could stand in the face of unambiguous text and intent.

was taken into trust under the 1934 Act that did not comply with the temporal limitation. This undisputed historical fact alone eviscerates any argument of a consistent 70 year interpretation to the contrary.

Second, in the years since 1961 (the next 46 years) only two tribes have had land taken into trust that were not IRA tribes without a separate congressional act (and one was with a restricted trust). Opponents again attempt to prove that which they could not show two times prior. It is now strike three. A single unrestricted trust conversion does not a longstanding administrative practice make.

Third, Opponents' attempt to undo the clear temporal limitation of the 1934 Act is *directly refuted* by: 1) the plain language of Section 479 of the Act, which remains intact today; 2) the position of the author of the temporal limitation, BIA Commissioner John Collier, as well as his Assistant, Felix Cohen; 3) the stated purpose of the limitation by the co-sponsor of the IRA, Senator Edgar Howard; and 4) the interpretation of the limitation by two sister Circuits and the Supreme Court itself in *John.*

Tacitly acknowledging the avalanche of law and historical fact contrary to Opponents' revisionist history of the 1934 Act, the Secretary uses almost half of his brief to argue again that even if State Appellants are right on the temporal limitation of the 1934 Act, amendments made to the Act in 1994 eliminated the limitation. Congress, however, has declined to change one word of the relevant Section 479 since the day of passage of the Act nearly 73 years ago and carefully limited the 1994 amendments so that they do not impliedly repeal the temporal limitation.

While the Secretary argues that the 1994 amendments "prohibit federal agencies from categorizing tribes" and mandate that "all recognized tribes be afforded equal privileges and immunities,"[3] the law is directly to the contrary, and the Secretary knows it.[4] That is because Title 25 of the United States Code, entitled "Indians," routinely provides different tribes with different statutory rights that *must* be observed by the Secretary. Once such act is the Indian Gaming Regulatory Act, which provides different tribes with very different rights to Indian gaming depending upon whether their Indian lands were acquired on or after "October 17, 1988." 25 U.S.C. § 2719(a). Moreover, Congress has further limited or eliminated IGRA gaming for many tribes – including the Narragansetts – regardless of the date of Indian land acquisition. The Secretary can no more claim that the 1994

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[3] Supplement Brief of the Federal Appellees ("*Sec. Br.*") at 8.

[4] Indeed, the Secretary attaches, as Exhibit F, a Memorandum on the IRA amendments that makes this point very clear: "Title 25 of the United States Code is replete with special legislation limiting or otherwise affecting the power of individual tribes . . ." July 13, 1994, Memorandum of Ada Deer, Asst. Sec. Indian Affairs, at 4. Moreover, in *Kahawaiolaa v. Norton*, counsel of record in this case, Elizabeth A. Peterson, took precisely the same position the State Appellants take here: "If different treatment of Indian groups were subject to heightened scrutiny then much of Title 25 of the United States Code could be called into question. Title 25 contains numerous provisions addressing specific Indian tribes or groups." Brief of Appellee Secretary of the Interior, 2003 WL 22670058 * 37-38 (9th Cir. May 15, 2003).

amendments prohibit him from abiding by IRA's temporal limitation than he can claim that he must ignore IGRA's temporal limit (or the differential treatment Congress affords to innumerable tribes).

II. ARGUMENT

Historical Action and Administrative Practice of the BIA Since 1934 is Consistent with the Plain Language of the Act, Congressional Intent and the Supreme Court's Holding in *John*

A. Point-by-Point Rebuttal of Opponent Contentions

* The Secretary liberally quotes the views of Commissioner John Collier, the "Secretary of the Interior at the time of the IRA," discussing the Act in his annual report. *Sec. Br.* at 13. What the Secretary does not quote is the position of Commissioner Collier during hearings on the Act. The truth is that Commissioner Collier proposed the very temporal limitation at issue in this case precisely *to prevent new tribes from coming within its scope without an act of Congress*. Responding to concerns from senators that tribes that were not bona fide could come within the Act under the pending definition of "Indian" ("include[s] all persons of Indian descent who are members of any recognized Indian tribe," and all others of one-fourth or more Indian blood, Senate 1934 Hearings at 264), the Commissioner offered the following temporal limitation:

> 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.

Hearing Before the Senate Committee on Indian Affairs 73d Cong., 2d Sess., part 2 at 266 (emphasis added). As such, it could not be more clear that the position of the Secretary during passage of the Act and for years thereafter was that the temporal limitation of "now" that he proposed for the final version of the bill meant at the time of passage of the Act, and not "whenever" as the current Secretary argues in this case.[5] It is thus hardly surprising that for the first 27 years after the IRA passed there is no dispute that not a single non-IRA eligible tribe received an acre of land into trust under the IRA.[6]

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[5] Indeed, as recently as 1980, the Secretary had no dispute with the plain reading of Section 479 as including a temporal limitation "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, in 2002 and 2004, the Secretary did not argue against the District Court of Hawaii's strong opinion in *Kahawaiolaa v. Norton* concluding that IRA was temporally limited, or apparently against the Ninth Circuit's affirmance of that decision, which looked to the status of Native Hawaiians as of 1934. Both cases are discussed at length in previous State Appellant briefings.

[6] The dean of Indian law, Felix S. Cohen (then Assistant Solicitor), likewise interpreted IRA as temporally limited in a memorandum to Commissioner Collier: "Clearly, this group [Siouan Indians of North Carolina] is not a

* Likewise, congressional intent was equally unambiguous. The cosponsor of the IRA, Senator Edgar Howard, explained to Congress that the amended definitional section "recognizes the *status quo of the present reservation Indians* and further includes all persons of one quarter Indian blood." *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1221 n.10 (D. Haw. 2002) (quoting Congressional Debate on the Wheeler-Howard Bill (1934) in The American Indian and the United States, Vol. III. Random House 1973) *aff'd* 386 F.3d 1271 (9th Cir. 2004).[7]

* Amici argue that the State's interpretation of the IRA is wrong because there are no other current federal programs that temporally limit

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'recognized Indian tribe now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one half or more Indian blood." Brownell, Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U.Mich. J.L. Reform 275, 287 (2001) (citing article quoting unpublished memorandum from Cohen to Collier of April 8, 1935).

[7] The Department's administrative history should include its own list of tribes IRA eligible tribes, which list would further undercut its view that a tribe can come into IRA at any time. That is because "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).

eligibility. *Amici* at 6. Of course, as discussed previously, IGRA also contains a temporal limitation. Regardless of such limitations, however, there is no dispute that a plethora of federal programs, including those relating to health care, roads, economic development, and education apply to all federally recognized tribes, regardless of their date of recognition. It is also true that no other general Indian program authorizes federal trust over land, stripping the State of jurisdiction over land within its borders as does the 1934 Act.[8] *This* is why the 1934 Act is special and temporally limited and Congress has chosen not to eliminate the limitation in over 70 years. Instead, for non-IRA eligible tribes, Congress has chosen to grant trust authority to the Secretary on a *case by case* basis in settlement and other acts specific to each tribe and state. In these acts, the states, tribes and federal

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The Secretary represents that he is "unaware" of this list. *Sec. Br.* at 6-7.

[8] When, as proposed here, the Secretary takes land into unrestricted trust for an Indian tribe there are immediate practical consequences to the host state. "Land taken into trust under § 465 is isolated from state and local control in at least three important respects. First, trust land is considered "Indian Country" for jurisdictional purposes. As such, it is removed from state civil and criminal jurisdiction, unless the Tribe consents to such jurisdiction. Second, . . . trust land is exempt from state and local taxation. And third, . . . trust land is exempt from state and local land use regulation . . .." *Ex rel. Blumenthal v. Babbit*, 26 F.Supp.2d 397, 401 (D. Conn. 1998) *rev'd on other grounds*, 228 F.3d 82 (2nd Cir. 2000) (internal citations omitted). Also, federal trust is a predicate for casino gaming under IGRA.

government all have a voice in working out the relevant jurisdictional framework as is the case in both Massachusetts and Maine.

* Additionally, the purpose of the IRA was decidedly different than all other general legislation providing programs to tribes. As briefed and discussed at oral argument, the IRA was designed to remedy the damaging effects of the General Allotment Act (Dawes Act) of 1887. *Brendale v. Confederated Tribes*, 492 U.S. 408, 436-37 (1989). Under the Allotment Act, Indian reservations created by treaty, act of Congress or presidential executive order were allotted in severalty to individual Indians. While the intent was "civilization" and assimilation, the result was a loss of more than 90 million acres of Indian land and the dissolution of tribal structure. Felix S. Cohen, Handbook of Federal Indian Law, 130-38 (1982 ed.). By the early 1930s the assimilationist policies exemplified by the Allotment Act had been renounced and, in 1934, Congress passed the IRA as a specific remedy for the loss of land and tribal structure occasioned by allotments. The only entities that qualify for the remedy of IRA were those tribes that had lost land by allotment. In other words, if a tribe was federally recognized and under federal jurisdiction in 1934, it would have suffered the diminution of its lands through allotment. If, like the Narragansetts and the Mashantucket

Pequots, on the other hand, a tribe was not federally recognized and under federal jurisdiction in 1934, the Allotment Act would not have applied and would have had no effect.[9]

The position of State Appellants – that the IRA is a specific remedy for allotments and has no application to tribes that did not lose land through the allotment system – is no outlier. The Secretary has urged precisely the same interpretation of the IRA before other courts. For example, in *Kahawaiolaa v. Norton,* the Secretary argued that since the IRA was designed as a remedy to allotment-based land loss, native groups whose land was not subject to allotments were not covered by the IRA.

> The Department's interpretation of the scope of the IRA as not extending to native Hawaiian groups is consistent with the IRA's purposes, which were to reverse the devastating effects of prior federal Indian policies on Indian tribes that preceded its enactment in 1934. . . . The Supreme Court in *Brendale v. Confederated Tribes,* 492 U.S. 408, 436 n.1 (1989), recognized that the IRA was passed specifically to address the failed allotment policy and to remedy the loss of over 90 million acres of Indian land. *As there were no reservations or any allotment system in Hawaii, the purposes of the Act make it highly unlikely that Congress considered Native Hawaiians within the scope of*

[9] This is not to say that tribes like the Narragansett and Mashantucket Pequot did not also lose land. They clearly did. But their losses predated the Allotment Act and were the result of land transfers allegedly in violation of the Non-Intercourse Act of 1790. The specific congressional settlement acts for these tribes, not the IRA, are the remedy for such land losses.

the IRA. There is nothing in the legislative history to support a contrary inference.

Brief of the Appellee Secretary of the Interior, 2003 WL 22670058 *26-27 (9th Cir. May 15, 2003)(emphasis added) (Elizabeth A. Peterson, counsel of record).

* In light of the above and prior briefing, the Secretary's claim in this case claims that the policy goal of the IRA "was to remedy the effects of land loss generally, not the effects of allotment policy specifically," *Sec. Br.* at 13, holds no water. It was specific settlement acts that addressed land loss for non-IRA tribes. The Secretary also fails to explain how "land loss" is involved in the proposed trust-taking here. The Tribe already owns the parcel (and other land in fee simple like all other Rhode Islanders) and has the right to build the proposed Tribal housing under State law and Town ordinance. The only purpose, therefore, that federal trust accomplishes here,[10] is to rip the parcel from the jurisdiction of the State and Town, set statewide precedent, and allow a future use on a parcel or elsewhere (*e.g.*, a casino) inconsistent with the Rhode Island Constitution and/or State law.

[10] The Tribal Housing Authority's non-profit status would, independently, protect it from taxation.

B. There is no Evidence Proving 70 Years of Consistent Administrative Practice Ignoring Section 479's Temporal Limitation

Despite being given several chances by this Court, neither Indian Amici nor, more importantly, the Secretary have come up with evidence of administrative practice that supports their assertion that "all of 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."[11]

Instead of supplying evidence of a consistent practice of converting land to trust for tribes regardless of their status in 1934, the Secretary proffers evidence only to support this syllogism: a number of tribes have been administratively acknowledged by the Secretary well after 1934; some of these tribes have land in trust under Section 465 of the IRA; therefore, Section 465 is not limited to those tribes both federally recognized and under federal jurisdiction in 1934. Essentially, the Secretary argues that BIA acknowledgment of a tribe *after* 1934 is evidence that the tribe lacked federal recognition *in* 1934. The Secretary's practice of placing land into trust for

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[11] First, he argues that the State has "presented no evidence to support its theory that the Secretary previously interpreted the statute more narrowly." *Sec. Br.* at 4. Just the contrary is true. The State previously presented powerful evidence that the Secretary's administrative trust conversion practice, with two exceptions, has been consistent with the State's

these later acknowledged tribes, he argues, perfectly supports the notion that the IRA is unencumbered by any temporal limitation.

If BIA acknowledgment were the exclusive method for federal recognition, the Secretary might have a point. But BIA acknowledgment – as the Secretary surely knows – is only one means by which an Indian tribe may become federally recognized. It is black letter law that federal recognition may arise from a treaty, an act of Congress, an executive order, BIA acknowledgment or even from a course of dealing with a tribe as a political entity. William C. Canby, Jr., American Indian Law, 4-5 (4th ed. 2004). It is also a bedrock principle of Indian law that "the Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so." *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1203 (10th Cir. 2002) *quoting United States v. Washington,* 641 F.2d 1368, 1371 (9th Cir. 1981). The federal government has long "recognized groups of Indians as tribes in a variety of ways for a variety of purposes. Even after the promulgation of Part 83, 'tribes cannot be neatly divided into 'recognized' and 'nonrecognized' tribes for all purposes; rather,

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interpretation of the IRA. *See, e.g.,* Response to Amici (8/23/05) at 8-13.

a tribe may 'exist' for some purposes but not for others." *Timpanagos,* 286 F.3d at 1203 (internal citations omitted). Thus, it is beyond dispute that once a tribe has entered into a treaty with the United States, it continues to be federally recognized, notwithstanding the conduct of the Secretary, until Congress terminates the relationship.

In support of his argument that he may convert land to trust for tribes regardless of their status in 1934, the Secretary attaches, as Exhibit A to his Brief, "land records reflecting trust acquisitions made by the Secretary pursuant to 25 U.S.C. § 465 on behalf of ___ [sic][12] other tribes that were not 'federally recognized' in 1934 but have since been acknowledged as tribes by the Secretary. . .." *Sec. Br.* at 5. These records show nothing of the sort. Instead, they detail land acquisitions for twelve tribes. As discussed in the State's previous briefs (particularly in its 8/23/05 Response to Amici), each tribe for which the Secretary attaches land evidence records falls into one of two groups. Either the tribe was federally recognized in 1934 (by federal treaty, presidential proclamation or course of dealing) or, if not so

[12] The State Appellants have shown that the space left blank by the Secretary here should be filled in with the number "two."

federally recognized, the tribe has another specific act of Congress authorizing these trust conversions.

The Jamestown S'Klallam (also spelled "Clallam" in records provided by the Secretary), for example, were signatories to the Point no Point Treaty of 1855 (*see App. D to Sec. Br.* at 1). That treaty relationship was never terminated by Congress (*see App. D to Sec. Br.* at 1-2). In the 1930s efforts were made to organize the Clallam under the IRA (*see App. D to Sec. Br.* at 3-4) and, indeed, this tribe is listed as an IRA eligible tribe in Table A of Haas (*see App. B to Sec. Br.* at 23). Thus, it is beyond peradventure – as made abundantly clear by the Secretary's own documentation – that the S'Klallam were federally recognized and under federal jurisdiction in 1934. The Secretary's administrative acknowledgment of the S'Klallam in 1981 says nothing about the S'Klallam's federal recognition in 1934.

The Mashantucket Pequot, by contrast, were not federally recognized and under federal jurisdiction in 1934.[13] They were federally recognized by an act of Congress in 1983. 25 U.S.C. § 1758(a). Because the Mashantuckets were not federally recognized and under federal jurisdiction

[13] *See* 25 U.S.C. § 1751(f) (acknowledging the United States' longstanding denial of jurisdiction over the Tribe.)

in 1934, they needed (and have) an act of Congress that specifically authorizes the Secretary to convert land to trust for them. 25 U.S.C. § 1754(7).[14]

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[14] For the Court's convenience, the State sets forth the other 10 tribes the Secretary claims could not have been "federally recognized" in 1934 because they were administratively acknowledged by the Secretary years later. Beside each listed tribe, the State sets forth the basis for federal recognition and jurisdiction in 1934: Snoqualmie (signatory to Point Elliot Treaty of 1855); Stillaguamish (signatory to Point Elliot Treaty of 1855); Samish (signatory to Point Elliott Treaty of 1855); Jena Band of Choctaw (part of the historic Mississippi Choctaw, a signatory to numerous treaties with the United States, *see John,* 437 U.S. at 638-46(setting forth numerous treaties between the Choctaw and the United States and detailing extensive U.S. involvement with the Choctaw, including removal and allotment and reorganization under the IRA); *see also* Haas at Table A); Coushatta (part of the larger Creek Confederacy, federal recognition by virtue of the Treaty with the Creeks, June 14, 1866 and through federal "course of dealing" including removal); Poarch Band of Creek (same; *see also Sec. App. D* at 15.); Karuk (Presidential Proclamations of 1855 and 1864 setting up a reservations for Hoopa, Yurok and Karuk tribes); Sault Ste. Marie Tribe of the Chippewa (signatory to Treaty of 1855; also have separate act of Congress authorizing trust); Grand Traverse Band of the Ottawa and Chippewa (signatory to 1855 Treaty of Detroit; determined to be IRA eligible by Collier. *See* 25 U.S.C. § 1300k(5)) and the Huron Potawatomi Tribe (signatory to Treaty of 1833; ensuing federal relationship never terminated by Congress, *see App. D.* at 21). All of this has been discussed at length in State Appellants' 8/23/05 Response to Amici at 8-13 and documentation *in the Secretary's own Appendices* simply confirms the State's position. The State thus stands by its consistent position that once a tribe has been recognized by a treaty or an act of Congress, it remains recognized, so long as it remains in existence, unless terminated by Congress.

Thus, the Secretary's documentary evidence does not support his alleged administrative practice of taking land into trust regardless of federal recognition in 1934. All twelve tribes (except the Mashantucket for whom Congress has specifically authorized trust) were federally recognized in 1934 and the Secretary's trust conversions on their behalf are consistent with the temporal limitation of Section 465 of the IRA.

Amici try a less ham-handed, but ultimately unavailing, approach. First, they point to several Solicitor Opinions during the years immediately following the passage of the IRA. They claim that these Opinions support their claim that the Secretary "has consistently looked to the current status of the Tribe to determine eligibility for IRA benefits." *Amici* at 2. None do. All of the Opinions cited by Amici concern Indian groups for whom no evidence of federal recognition (either at the time of the opinion or in 1934) was proffered. Lacking such evidence, each group was either denied IRA eligibility outright or required to demonstrate sufficient blood quantum to establish eligibility.[15] As a result, none of these Opinions touch the temporal issue in a way that supports Amici.

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[15] Solicitor's Opinion, Jan. 29, 1941 (*Amici App.* 1) (Because the St. Croix were not a federally recognized tribe, they were required to demonstrate blood quantum for IRA eligibility. Although the temporal limitation of IRA

Amici also claim that the State's temporally-limited construction of the IRA is "overblown" since only four of the tribes administratively acknowledged by the BIA since 1960 appear on the Haas List at Table A. *Amici* at 6. Haas Table A, however, is simply a BIA listing of tribes that voted to accept or reject the provisions of the IRA. It is not, and does not pretend to be, a list of all tribes that were federally recognized and under federal jurisdiction, and, thus, IRA eligible, in 1934. The IRA applies to all tribes federally recognized and under federal jurisdiction in 1934, unless such a tribe specifically voted against its application. 25 U.S.C. § 478. Thus, a list of tribes voting for or against the IRA says nothing about the larger group of tribes that were eligible for inclusion in the IRA.

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are not specifically addressed, it is clear from the text of the opinion that the St. Croix were not federally recognized or under federal jurisdiction in 1934); Solicitor's Opinion, May 31, 1946 (*Amici App.* 2) (merely noting that the Solicitor lacked sufficient information to determine whether the Burns Paiute Indians were a recognized tribe); Solicitor's Opinion, May 1, 1937 (*Amici App.* 3) (failing to find evidence of federal recognition of the Nahma and Beaver Indians and, thus, requiring blood quantum for IRA eligibility); Solicitor's Opinion January 9, 1947 (*Amici App.* 4) (Solicitor lacked sufficient information to determine tribal status). The remaining Solicitor Opinions cited concern the Oklahoma Welfare Act, 25 U.S.C. § 501, *et seq.*, whose provisions contain no temporal limitation. These Opinions are, therefore, irrelevant on the issue of IRA and its temporal limitation.

Amici also play try to play "gotcha" by claiming that, with respect to some later recognized tribes for whom Congress has passed a specific statute authorizing trust, the statute makes only a "narrow" trust authorization for certain parcels. Amici claim that other parcels of land have been taken into trust pursuant to Section 465. *Amici* at 7. For this proposition, Amici point to only one tribe – the Miccosukee of Florida. Amici attach, at Appendix 9, a 2005 deed from the Miccosukee to the United States to hold certain land in trust. Amici point out that this parcel is not held in trust pursuant to 25 U.S.C. § 1747(a), which State Appellants previously identified as specific congressional authority for trust conversions for the Miccosukee. *See* State Appellants' Response to Amici at 13. State Appellants have diligently researched this contention and have determined that the parcel is, most likely, held in trust by virtue of the trust provisions of a *second* congressional act for the Miccosukee, the Miccosukee Settlement Act of 1997, 25 U.S.C. § 1750, *et seq.* (*see* section 1750c(4) authorizing additional lands be taken into trust for the Miccosukee).

Finally, Amici cough up "written evidence" of three tribes for whom they claim the Secretary made trust conversions under Section 465 even though these tribes have been "determined *not* to have been recognized in

1934." *Amici* at 9. A review of Amici's evidence, however, proves the State's point, not Amici's.

Amici first cite a case dealing with Secretary's wrongful termination of benefits for the Grand Traverse Band (GTB), a tribe that signed numerous treaties with the United States and whose relationship was never terminated by any act of Congress. Notwithstanding the GTB's unquestionable federal recognition arising from its status as a treaty tribe, then-Secretary of the Interior Delano misread the terms of the 1855 Treaty of Detroit as dissolving the GTB and, accordingly, ceased to treat it as a federally recognized tribe. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney,* 369 F.3d 960 (6th Cir. 2004). The narrow question before the Court was whether, in light of the Secretary's wrongful severance of the government-to-government relationship, the GTB could qualify as a "restored tribe" for the purposes of Section 2719(b)(1)(B)(iii) of IGRA. Since the term "restored" is not defined by IGRA, it was given the broadest possible meaning by the National Indian Gaming Commission (NIGC) and the courts. Thus, the GTB constituted a "restored tribe" under IGRA because federal benefits were "returned" to them and the wrongful administrative action purporting to sever their government-to-government

relationship was "undone." 369 F.3d at 969. A different result would have obtained if the courts had considered the issue presented here – whether administrative action by the Secretary could terminate federal recognition arising from a treaty with the United States. The answer under black letter law is no. Thus, the GTB are not, as Amici contend, an example of a tribe with IRA trust lands who were not federally recognized and under federal jurisdiction in 1934.

For precisely the same reasons, the NIGC's 2006 determination that the Sault Ste. Marie are a "restored" tribe under IGRA does not support Amici's argument that the tribe was not federally recognized and under jurisdiction in 1934. Indeed, in 1980, the United States District Court for the District of Columbia determined that, for the purposes of Section 465 of the IRA, the Sault Ste. Marie was both federally recognized and under federal jurisdiction in 1934 by virtue of the August 2, 1855 Treaty with the United States. *City of Sault Ste. Marie v. Andrus,* 532 F.Supp. 157, 161 (D.D.C. 1980). The Court's determination of the Sault Ste. Marie's tribal status for the purposes of IRA – not the NIGC's opinion on whether it met the "restored tribe" exception of the IGRA – is dispositive on the issue of its federal recognition in 1934.

Finally, Amici cite the Jena Band of the Choctaw as another example of a tribe that was not federally recognized and under federal jurisdiction in 1934 for whom the Secretary has converted land to trust under Section 465. The Jena Band of the Choctaw do not support Amici's claim. The Jena Band were part[16] of the Mississippi Choctaw which was unquestionably federally recognized and under federal jurisdiction in 1934. For that reason alone, the Jena Band met the temporal limitation of the IRA. *See* Proposed Finding for Federal Acknowledgement of the Jena Band of the Choctaw Indians, 59 FR 54496 *54497 (1994) (finding that the Jena Band were part of the Mississippi Choctaw).

Thus, Amici have no "written evidence" refuting the State's position that the IRA is temporally limited or demonstrating any administrative practice on the part of the Secretary of converting land to trust for tribes regardless of their status in 1934. Amici's "written evidence" submitted with its brief merely supports the State's theory that the Secretary's administrative practice is generally consistent with the temporal limitation of the IRA.

[16] It is for this reason that "the Federal government did not recognize the Jena Choctaw Indians as a *separate* tribal entity." *Amici* at 10.

After numerous tries by Opponents, State Appellants are left scratching their heads. Why can't the Secretary of the Interior and Indian Amici – despite at least three separate attempts to do so – demonstrate any evidence to support their claim made to this Court that "all Secretaries of the Interior for the last 70 years have read the word 'now' to mean the present, as at the time of the tribe's application" and that "scores of tribes would be implicated if this Court were to accept the state appellants' argument?" The answer is as plain as the nose one's face. Their claim simply is not true.[17]

C. The Secretary's Continued Reliance on 1994 Amendments to IRA (not Touching Section 479) as Effecting an Implied Repeal is Misplaced

No doubt aware that the text the IRA, congressional intent (as well as that of the BIA), historical record and the Supreme Court's decision in *John* leave the Secretary's position in this case that Section 479 of the IRA contains no temporal limitation in tatters, the Secretary once again briefs

[17] The only two possible examples where the Secretary disregarded IRA's temporal limitation were for the trust acquisitions involving the Tunica-Biloxi and the Narragansett (albeit subject to the civil and criminal laws of the State of Rhode Island). A single unrestricted trust conversion, however, does not a longstanding administrative practice make. Moreover, the total acreage involved in these non-IRA compliant transactions is less than 2,000. The Secretary consistently argues that the Quiet Title Act bars any challenge to the title of lands taken into trust for Indians. Thus, under the federal view, even these two non-compliant conversions cannot be challenged.

amendments to the IRA made in 1994. Without saying so, he is really arguing that the temporal limitation in Section 479 was impliedly repealed by the amendments, by "prohibiting" the distinction for trust taking purposes between tribes recognized and under federal jurisdiction in 1934 and those that were not. The Secretary claims that the "Federally Recognized Indian Tribe List Act," 25 U.S.C. § 479a (1994) (the "List Act") and a 1994 amendment to Section 476, passed months later, require him to ignore the temporal limitation by their plain terms. Neither says anything of the sort.

It is black letter law that repeals of congressional acts by implication are strongly disfavored. Congress is presumed to know the contents of the statute it is amending as well as applicable Supreme Court precedent, such as *John*. There is no dispute that Congress has declined to change a single word of Section 479's temporal limitation (it need only delete the word "now" or add the words "or hereafter" as it did elsewhere in the IRA) to the present day. There is also no dispute that in the congressional history appended to the Secretary's brief neither Section 479, nor federal trust taking, nor the Supreme Court's decision in *John* are mentioned anywhere. As such, the Secretary is arguing that Congress amended the IRA to allow jurisdiction-stripping federal trust for tribes not passing the Supreme Court's "recognized

[in 1934] tribe" test *sub silentio*. If the silence of the amendments on the temporal limitation were not enough to refute any notion of an implied repeal of Section 479's temporal limitation, what the amendments do say puts the nail in the coffin.

By its express terms, the List Act provides a definition of "Indian tribe" only "[f]or purposes of this title," and no other. The Act goes on to define "this Title" as "Section 479a." 25 U.S.C. § 479a. Thus, Congress painstakingly insured that its new definition of Indian tribe in Section 479a for a limited purpose is *not* to be imported to Section 479. If anything, that Section 479a was specifically confined shows congressional intent affirming Section 479's temporal limitation. Otherwise, there would have been no reason to limit Section 479a's definition of Indian tribe to that section of the IRA only. The List Act itself does nothing more than require the Secretary to publish annually a list of all then-federally recognized Indian tribes. The List Act disavows any pretense of changing the definition of Indian or tribe contained in IRA or any of the myriad of federal acts providing programs or services to Indians.

Section 476(f) and 476(g), likewise, are of no help to Opponents. First, the amendment is to Section 476 of the IRA and *not* 479. It makes no

change whatsoever to the definitional Section 479. Section 476 is entitled: "Organization of Indian tribes; constitution and bylaws and amendment thereof; special election." It deals with a tribe's ability to constitute a government for its "common welfare" and to "adopt an appropriate constitution and bylaws."[18] 25 U.S.C. § 476(a). The amendment referred to does not apply to any *legislation*; rather, it prohibits the executive branch from promulgating regulations or making any decision "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized Indian tribes by virtue of their status as Indian tribes." 25 U.S.C. §§ 476(f), (g). It was not the executive branch that established the temporal limitation in Section 479; it was Congress. Moreover, the amendment applies only to

[18] As discussed above, Section 476 also allows tribes to organize their tribal government "outside the parameters of the Act." The sponsor of this bill, Sen. John McCain, found that "the Department of the Interior has interpreted Section 16 [of the IRA, 25 U.S.C. § 476] to authorize the Secretary to categorize or classify Indian Tribes as being either created or historic. According to the Department, created Tribes are only authorized to exercise such powers of self-governance as the Secretary may confer on them." 140 Cong. Rec. S 6144-03, S 6146 (May 19, 1994). The comments of Sen. McCain reflect the sole purpose of the amendment: to ensure that the Secretary did not provide different tribes with different governmental authority. *See also* Remarks of Rep. Richardson 140 Cong. Rec. E 663-03, (April 14, 1994). This is a far cry from amending Section 479 of the IRA.

executive branch discretion "by virtue of their status as Indian tribes." It says nothing concerning whether the entity *is* a tribe under Section 479 of the IRA. Properly understood, the 1994 amendments constitute far too slender a reed upon which to create an implied repeal.[19]

Truth be told, the amendments to the 1934 Act are important not for what they did do; but rather for what they did not. If Congress wished to remove the temporal limitation contained in Section 479, it knew exactly how. It could simply delete the word "now" or (as it did in Section 472) add the words "or hereafter" following "now." That it has not done so, confirms that Congress meant what it said in 1934. The plea of Opponents that this Court do what Congress has not, must be rejected.

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[19] Opponents' quotes from Senators McCain and Innoye do not change this. Indeed, neither speak of the temporal limitation and Sen. Innoye's reference to not distinguishing with respect to "the manner in which the tribe became recognized by the United States," refers to whether such recognition was by treaty, settlement act, other congressional act, or administrative decision. It has nothing to do with the date of such action.

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CERTIFICATE OF SERVICE

I hereby certify that caused to be forwarded a copy of the within Reply Brief via regular mail, postage prepaid, to Elizabeth Ann Peterson, Appellate Section Environment & Natural Resources Division, US Department of Justice, PO Box 23795 L'Enfant Station, Washington, D.C. 20026; Anthony C. DiGioia, Esq., Assistant United States Attorney, 800 Fleet Center, Providence, RI 02903; and Ian Gershengorn, Esq., Jenner & Block LLP, 601 Thirteenth Street NW, Washington, D.C. 20005 on the 27th day of February 2007.

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