EN BANC ORAL ARGUMENT HEARD JANUARY 9, 2007

No. 03-2647

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DONALD L. CARCIERI, in his capacity
as Governor of the State of Rhode Island, et al.,
Plaintiffs-Appellants,

v.

DIRK KEMPTHORNE, in his
capacity as Secretary of the Department of the Interior, et al.,
Defendants-Appellees.

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

POST-ARGUMENT EN BANC BRIEF FOR AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, INDIVIDUAL INDIAN TRIBES, AND TRIBAL ORGANIZATIONS IN SUPPORT OF DEFENDANTS-APPELLEES

(full listing of Amici Curiae inside)

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February 6, 2007

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LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS

Absentee Shawnee Tribe
Akiak Native Community
Cahto Tribe of the Laytonville Rancheria
Cheyenne River Sioux Tribe
Coeur d'Alene Tribe
Confederated Salish and Kootenai Tribes of the Flathead Nation
Confederated Tribes of the Warm Springs Reservation of Oregon
Eastern Pequot Tribal Nation
Eastern Shawnee Tribe of Oklahoma
Ely Shoshone Tribe
Fallon Paiute-Shoshone Tribe
Ft. McDermitt Paiute-Shoshone Tribe
Grand Traverse Band of Ottawa and Chippewa Indians
Inupiat Community of Arctic Slope (IRA)
Kenaitze Indian Tribe, IRA
Kickapoo Tribe in Kansas
Lac Courte Oreilles Band of Lake Superior Chippewa
Lovelock Paiute Tribe
Lummi Nation
Moapa Paiute Band of the Moapa Indian Reservation
Modoc Tribe of Oklahoma
Native Village of Venetie IRA Tribal Government
Nez Perce Tribe
Oneida Tribe of Indians of Wisconsin
Prairie Band of Potawatami Nation
Pueblo of Laguna
Pueblo of Santa Ana
Pueblo of Taos
Seminole Tribe of Florida
Shoshone-Paiute Tribes of the Duck Valley Reservation
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
St. Regis Mohawk Tribe
Suquamish Tribe

LIST OF AMICI CURIAE TRIBES AND TRIBAL ORGANIZATIONS
(continued)

Tanana Chiefs Conference
Te-Moak Tribe of Western Shoshone Indians
Tuolumne Band of Me-Wuk Indians
United South and Eastern Tribes, Inc.*
Washoe Tribe of Nevada and California
Yomba Shoshone Tribe
Oglala Sioux Tribe

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* The members of USET are as follows: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmac Indians; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Miccosukee Tribe of Florida; Mississippi Band of Choctaw Indians; Mohegan Tribe of Connecticut; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe-Indian Township; Passamaquoddy Tribe-Pleasant Point; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; St. Regis Band of Mohawk Indians; Tunica-Biloxi Indians of Louisiana; Wampanoag Tribe of Gay Head (Aquinnah).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amici state as follows: Amicus National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages. Amicus United South and Eastern Tribes, Inc. ("USET") is a nonprofit inter-tribal organization founded in 1968. Tanana Chiefs Conference ("TCC") is a nonprofit intertribal organization of Interior Alaska tribes. NCAI, USET, and TCC have no parent corporations, and no publicly held corporation owns 10% or more of stock in NCAI, USET, or TCC.

The remaining amici are tribal governments that are exempt from Fed. R. App. P. 26.1(a).

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary's historical interpretation and administrative practice support the Secretary's authority under 25 U.S.C. § 465 to take land in trust for Indian Tribes, like the Narragansett Indian Tribe here, that were not recognized and under federal jurisdiction in 1934. Amici file this supplemental submission only to emphasize three points:

> *First*, the Secretary's practice in the years immediately following passage of the IRA looked to the status of the Tribe at the time of the land acquisition, not to the status of the Tribe in 1934. Indeed, the State has identified no case, and we have found none, in which the Secretary refused to take land in trust for a federally recognized tribe on the ground that the Tribe was not recognized and under federal jurisdiction in 1934.
>
> *Second*, particularly in the post-Termination era, the Secretary has frequently taken land in trust for Tribes that were not recognized and under federal jurisdiction in 1934.
>
> *Third*, the Secretary's implementation of the IRA's land-acquisition provisions is entirely consistent with his interpretation and implementation of the other IRA provisions, and of Indian law more broadly. All of the IRA provisions would be at risk if the State's unprecedented argument were to prevail.

Amici's filing to make these points, however, should not be taken as agreement with the importance that the State places on this inquiry. To the contrary, it remains the position of Amici, as stated in the briefs and argument before this Court, that the propriety of the Secretary's decision to take land in trust for the Narragansett Indian Tribe can be determined independent of the history of the Secretary's administrative practice because the Secretary has

promulgated binding regulations on point, and they govern. *See* 25 C.F.R. § 151.2 (defining "Tribe" and "Individual Indian" for land acquisition regulations). Thus, even if the Narragansett Indian Tribe were the first Tribe not recognized in 1934 for whom the Secretary had taken land in trust – and it is not – and even if the Secretary had previously interpreted the statute not to permit such trust acquisitions – and he has not – the regulations in 25 C.F.R. Part 151 would still control.

I. The Secretary Has Consistently Looked To The Current Status Of The Tribe To Determine The Tribe's Eligibility for IRA Benefits.

In exercising authority under the IRA, the Secretary has consistently looked to the current status of the Tribe to determine eligibility for IRA benefits. That practice began almost immediately on passage of the Act, and it is evident in the decades leading up to the Termination Era. Thus, in the 1930s and 1940s, various bands of Indians approached the Secretary seeking a declaration that they were eligible to reorganize and take advantage of other IRA benefits. The Secretary did not turn those Indians away on the ground that they were not on some "1934 list"; nor did the Secretary analyze the band's status as of 1934. Instead, the inquiry was whether the Indians currently constituted a Tribe.

That much is evident from the Opinions of the Solicitor of the Interior throughout this period. Thus, for example, when the St. Croix Indians of Wisconsin sought eligibility for benefits in 1941, the Secretary concluded that

they could organize only as a half-blood Tribe because they "are not now recognized as a band." Solicitor's Opinion, Jan. 29, 1941, 1 *Op. Sol. on Indian Affairs* 1026 (U.S.D.I. 1979) (St. Croix Indians) (Appendix 1). Nor is the St. Croix opinion unique. The Opinions from this period consistently look to whether bands of Indians currently "constitute" or "enjoy status as" a Tribe – status as of 1934 is not part of the analysis. *See, e.g.*, Solicitor's Opinion, May 31, 1946, 2 *Op. Sol. on Indian Affairs* 1394 (U.S.D.I. 1979) (Bishop Paiute Tribe) (group of Indians "must either constitute a recognized band or tribe or be residents of a reservation") (Appendix 2); Solicitor's Opinion, May 31, 1937, 1 *Op. Sol. on Indian Affairs* 747 (U.S.D.I. 1979) (Nahma and Beaver Island Indians) (Nahma and Beaver Island Indians "do not enjoy status as recognized bands or as Indians on a reservation") (Appendix 3); Solicitor's Opinion, Jan. 9, 1947, 1 *Op. Sol. on Indian Affairs* 1480 (U.S.D.I. 1979) (Nooksack Indians) (to gain benefits of IRA, Indians "must constitute a'tribe, or tribes, residing on the reservation'") (Appendix 4); *see also* Solicitor's Opinion, July 29, 1937, 1 *Op. Sol. on Indian Affairs* 774 (U.S.D.I. 1979) (Keetoowah Society of Oklahoma Cherokees) (Appendix 5); Solicitor's Opinion, Dec. 13, 1938, 1 *Op. Sol. on Indian Affairs* 864 (U.S.D.I. 1979) (Miami and Peoria Tribes of Oklahoma) (Appendix 6).[1]

[1] The benefits of Section 5 of the IRA were extended to the Oklahoma Tribes by Section 1 of the Oklahoma Indian Welfare Act of June 26, 1936, c. 831, 49 Stat.

Consistent with this early practice, the regulations promulgated in 1938 that defined "Indian" used the precise language of the IRA, but again without limiting its scope to 1934. Thus, 25 C.F.R. § 84.8 (1938), which the Secretary promulgated in May 1938 in part to implement the IRA, *see id.* § 84.81, defined "Indian beneficiaries" to include "All persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 84.8, *attached at* Appendix 7.

More broadly, the State has identified no case in the more than 70 years of the Act – and we have found none – in which the Secretary has turned down a Tribe that was recognized at the time it requested benefits on the ground that the Tribe had not been recognized in 1934. Nor has the State identified any case (and we have found none) in which the Secretary has exercised trust authority for a Tribe that was recognized in 1934 yet was not recognized at the time of the trust application, as would seem to follow from the State's construction of the statute.

The Secretary's long-standing practice is thus entirely consistent with his actions on behalf of the Narragansett Indian Tribe here.

1967, codified at 25 U.S.C. § 501.

II. The Secretary Has Taken Land In Trust For Indian Tribes Not Recognized And Under Federal Jurisdiction In 1934.

The State contends that all Indian Tribes for whom the Secretary has taken land in trust were recognized and under federal jurisdiction in 1934, have separate statutory authorization for taking land in trust, or have no federal trust land. The State articulates this position most forcefully in its August 2005 brief (at pages 8 to 13), where it purports to describe the status of 31 Indian Tribes administratively recognized by various Secretaries of the Interior from 1961 to 2003. The State's contention is not correct: In this post-Termination era, the Secretary has repeatedly taken land in trust for Tribes that were not recognized and under federal jurisdiction in 1934, and there are pending requests to take land in trust for additional such Tribes.[2]

From the outset, it is important to note that there are relatively few written

[2] In its brief, the State addressed the 31 administratively recognized Tribes cited by Amici in our Brief Opposing Rehearing En Banc (filed June 15, 2005). The listing of the 31 Tribes came from an official report of the United States General Accounting Office ("GAO") entitled Indian Issues; Improvements Needed in Tribal Recognition Process, GAO-02-49 (Nov. 2001). Amici Rehearing Opp. at 5-6. At that time, Amici noted that the GAO report may be underinclusive. See note 2. Indeed, the GAO has subsequently issued two additional reports which include information regarding Indian tribes recognized or restored since 1934: Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land In Trust Applications, GAO-06-781 (July 2006); and Indian Issues: BLM Program for Issuing Individual Indian Allotments on Public Lands Is No Longer Viable, (October 20, 2006). In the latter report, GAO identifies and describes the trust land status of 47 newly recognized tribes and 37 restored tribes, many of which do not appear on the Haas Table A List. GAO-07-23R at 13-19.

records of federal determinations regarding recognition circa 1934 because that status is – outside the question that the State poses here – of little relevance in Indian country. There are no current federal programs or benefits for which eligibility hinges on a Tribe's having been recognized and under federal jurisdiction in 1934. Proving federal acknowledgment as of 1934 is beside the point.[3]

It is also worth noting that, of the 30 Indian Tribes administratively recognized since 1961 that remain recognized today,[4] only four appear on the so-called "Haas Table A List" created in 1946 that the State references and relies upon in its brief. (A copy of the Haas Table A List is attached at Appendix 8.)[5] Thus, 26 of the 30 Indian Tribes recognized today did not appear on the 1946 list. That is strong prima facie evidence that the State's contention is overblown.

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[3]Indeed, as Amici have noted previously, *see, e.g.*, Supplemental En Banc Br. of Amici at 9 (filed Dec. 26, 2006), the inquiry makes little sense for the Narragansett Indian Tribe, or any other administratively recognized Tribe, because federal recognition is "recognition of a previously existing status." Thus, current federal recognition is itself an acknowledgment of a Tribe's continuous existence for more than a century. *See* 25 C.F.R. § 83.7 (requiring Tribes using the federal acknowledgment process to demonstrate substantially continuous existence since 1900).

[4] The Delaware Tribe of Oklahoma was administratively recognized in 1996, but it is no longer federally recognized today.

[5] The four Indian Tribes on the list are the Sauk-Suiattle, the Upper Skaget, and the Nooksack Indian Tribes of Washington, whose status as Indian tribes was federally acknowledged through a June 9, 1972 decision by the Deputy Commissioner of Indian Affairs, and the Burns Paiute Tribe of Oregon, whose status as an Indian Tribe was federally acknowledged by a November 16, 1967 Solicitor's Opinion.

In any event, evidence of the Secretary's practice is clear. *First*, for two Tribes – the Narragansett Indian Tribe and the Tunica-Biloxi Indian Tribe – the State has properly conceded in briefs and at oral argument that the Secretary has taken land in trust under the IRA even though these Tribes were not recognized and under federal jurisdiction in 1934.

Second, the State contends that for six of the administratively recognized Tribes that are not on the Haas Table A List, there is a separate statute that authorizes the Secretary to take land in trust. For a number of those Tribes, however, the statute is more limited. Typical is the Miccosukee Tribe. The State contends that IRA trust authority is not relevant for that Tribe because the Secretary has separate statutory authorization arising from 25 U.S.C. § 1747(a). *See* State Reply at 13 (Aug. 23, 2005). That statutory authorization, however, is for a specific land parcel. All subsequent parcels must be taken in trust pursuant to Section 465, and it is undisputed that the Miccosukee Tribe has had additional trust parcels. *See* Appendix 9 (Miccosukee deed invoking under Section 465 as statutory authority).[6]

[6] The State's discussion of a number of the other Tribes suffers from the same flaw. Thus, the Mohegan Tribe (25 U.S.C. § 1775c(a)), the Wampanoag Tribe (25 U.S.C. § 1771d), and the Death Valley Timbi-Sha Shoshone Band (P.L. 106-423) all have statutes that provide initial authorizations, but that do not appear to provide general authority to take land in trust. Although it is not clear to Amici whether these Tribes have yet had any land taken in trust outside the area authorized by their initial statutes, Section 465 would likely be the source of authority for any such acquisitions in the future. For the remaining two Tribes – the Penobscot Tribe and the Passamaquoddy Tribe – the statute prohibits additional

Third, the State's principal contention for another set of 11 Tribes is that these Tribes – none of which was on the Haas Table A List – nevertheless were recognized and under federal jurisdiction in 1934 because their members descend from a Tribe that had a treaty with the United States in the 1800s,[7] or because they were part of another Tribe that was recognized and under federal jurisdiction in 1934.[8] The State cites no authority for the proposition that a nineteenth-century treaty ensures recognition in 1934, and indeed that is not the case. Recognition in the sense intended by the IRA requires the Tribes to have an ongoing government-to-government relationship with the United States. Prior treaty relations do not prove such an ongoing relationship at a later point in time, and that is true even if the Tribe continued in an ethnological or cultural sense. *See, e.g.*, Felix S. Cohen, *Federal Indian Law* 462 (1958) ("It is not enough that the ethnographic history of the two groups shows them in the past to have been well recognized tribes or bands. A particular tribe or band may well pass out of

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land acquisitions. 25 U.S.C. § 1724(e).

[7] These Tribes include the Snoqualmie Tribe (Washington), the Match-e-be-nash-she-wish Band of Potawatomi Indians (Michigan), the Huron Potawatomi Tribe (Michigan), Jamestown S'Klallam Tribe (Washington), Grand Traverse Band of Ottawa and Chippewa Indians (Michigan), Stillaguamish Tribe (Washington), and the Sault Ste. Marie Tribe of Chippewa Indians (Michigan). The Karuk Tribe (California) was included in executive orders issued in the 1800s.

[8] These Tribes include the Jena Band of Choctaw Indians (Louisiana), Poarch Band of Creek Indians (Alabama), and the Coushatta Tribe of Louisiana (Louisiana).

existence as such in the course of time.").[9]

In any event, the written evidence refutes the State's position. The Secretary has used his Section 465 authority to take land in trust for Tribes that have been determined *not* to have been recognized in 1934, notwithstanding the Tribe's status as a signatory to a nineteenth-century federal treaty or its close identification with another Tribe. Several of these Tribes are discussed below:[10]

- Grand Traverse Band of Ottawa and Chippewa Indians – The State contends (without citation) that the Grand Traverse Band was federally recognized in 1934. State Reply at 11 (Aug. 23, 2005). The federal courts (and the United States) have repeatedly found to the contrary. The Sixth Circuit stated expressly that in 1872, then-Secretary of the Interior Columbus Delano improperly severed the relationship between the Band and the United States, ceasing to treat the Band as a federally recognized Tribe. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 369 F.2d 960, 961 (6th Cir. 2004); *see also Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the Western District of Michigan*, 198

[9] Indeed, if mere existence in 1934 in an ethnological sense, coupled with descent from an earlier treaty tribe, were enough to confer "recognition" under the IRA, none of the Tribes would have had to prove their continued existence from 1900 forward as part of the federal acknowledgment process.

[10] The examples cited surely understate the actual number of affected Tribes because they are limited to those Tribes whose recognition circa 1934 was resolved in the course of litigation occurring for other matters. Furthermore, the discussion here understates the impact of the State's argument in another respect: Other Tribes lack trust land currently but could be affected if the Court adopted the State's theory here. Thus, for example, the National Indian Gaming Commission ("NIGC") has determined that "the United States did not recognize the Cowlitz Tribe as a governmental entity from at least the early 1900s until 2002." NIGC Opinion at 5 (Appendix 10); *see also id.* at 4-8 (discussing history of federal recognition). The Cowlitz Tribe currently has no trust land, but it has applications pending. *See* 69 Fed. Reg. 65447 (Nov. 12, 2004).

F. Supp. 2d 920, 924 (W.D. Mich. 2002) ("Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe."); NIGC Opinion at 9 (noting that the BIA "administratively severed the federal government's relationship with the Band in 1876") (Appendix 11). As noted previously, the Band has 21 parcels taken in trust pursuant to the Secretary's exercise of Section 465 authority.[11]

- Jena Band of Choctaw Indians – The State contends that the Jena Band was federally recognized in 1934 because it *was* part of the Mississippi Choctaw. State Reply at 11 (Aug. 23, 2005). The Department of the Interior has rejected that very argument and determined that, prior to 1994, "the Federal Government did not recognize the Jena Choctaw Indians as a separate tribal entity." Summary Under the Criteria and Evidence for Proposed Finding for Federal Acknowledgment of the Jena Band of Choctaw Indians (Sept. 24, 1994) (Appendix 12). The State also states that it "could find no evidence that this tribe presently has federal trust land." State Reply at 9 (Aug. 23, 2005). In fact, the Tribe does have federal trust land. *See* Appendix 13 (deed citing Section 465 as authority for acquisition).[12]

- Sault Ste. Marie Tribe of Chippewa Indians – The State contends that the Tribe was federally recognized in 1934 because of a treaty in 1855. The National Indian Gaming Commission has squarely

[11] At oral argument, Counsel for the State appeared to argue that the Secretary has separate statutory authority to take land in trust for the Band. To the extent that argument was made, it is incorrect. All of the parcels for the Grand Traverse Band have been taken in trust pursuant to Section 465.

[12] The situation of the Poarch Band of Creek Indians, a Tribe recognized administratively in 1984 (49 Fed. Reg. 24,083 (Aug. 10, 1984)), is similar. The State contends that this Tribe was federally recognized in 1934 because it was part of a larger Creek confederacy it claims was recognized in 1934. State Reply at 10 (Aug. 23, 2005). The Department of the Interior concluded, however, that the Poarch Band of Creek Indians was distinct from the Muscogee (Creek) Nation of Oklahoma as a result of the Creek removal (in 1836). Recommendation and Summary of Evidence for Proposed Finding at 1 (Dec. 29, 1983) (Appendix 14). The Secretary has taken land in trust from the Tribe pursuant to his Section 465 authority. *See* Deed at 2 (citing Section 465) (Appendix 15).

> determined, however, that the Tribe was not recognized in 1934. *See* NIGC Opinion at 3-8 (describing history of government to government relations with the United States (Appendix 16); *see also id.* at 7 ("It is clear from the record that by 1917 the Department of the Interior did not consider Sault Ste. Marie a tribal entity with which it maintained government to government relations."); *see also id.* at 16 (noting that "[t]he Department of the Interior, Office of the Solicitor, concurs in this opinion").[13]

Fourth and finally, the State notes seven administratively recognized Indian tribes for whom the Secretary has not yet acquired any land in trust: the Cowlitz Indian Tribe (Washington), the Lower Lake Rancheria (California), the King Salmon Tribe (Alaska), the Shoonaq' Tribe (Alaska), the Samish Indian Tribe (Washington), the Ione Band of Miwok Indians (California), and the San Juan Southern Paiute Tribe (Arizona). All of these Tribes were only recognized in the last 15 years, and many have sought land under the IRA. *See, e.g.*, 69 Fed. Reg. 65447 (Nov. 12, 2004) (Cowlitz); 69 Fed. Reg. 68970 (Nov. 26, 2004) (Lower Lake Rancheria Koi Nation); 68 Fed. Reg. 63127 (Nov. 7, 2003) (Ione Band of Miwok Indians). So far as Amici are aware, none of these Tribes has separate statutory authority for the Secretary to take land in trust for the Tribe.

[13] Although the State relies on the district court's opinion in *Sault Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980), to suggest that the Tribe was recognized, the NIGC and the Secretary of the Interior discussed that opinion and rejected the interpretation the State now puts forth. NIGC Opinion at 6-7 (Appendix 16). In any event, there is no doubt that the Secretary took land in trust for a Tribe he has concluded was not recognized in 1934.

In short, even though written determinations of tribal status in 1934 are unusual because of the general irrelevance of that status in Indian law, most of the 30 Tribes that the State purports to analyze fall into one of three categories: (1) Tribes with statutes that, as with that of the Miccosukee Tribe, are more limited than the State suggests; (2) Tribes with nineteenth-century treaties that, as with those of Grand Traverse, Jena, and Sault Ste. Marie, are far less relevant than the State suggests; and (3) Tribes that the State has conceded were not federally recognized in 1934, such as the Tunica-Biloxi and the Narragansetts. Moreover, although many of the remaining Tribes are currently landless (and thus not part of the Secretary's "historical" practice), many of those Tribes (such as the Cowlitz Tribe) are currently seeking to acquire trust land.

Thus, to the extent the historical administrative practice is relevant to the Court's determination, the evidence confirms that the Secretary's current regulations and the Secretary's exercise of trust authority for the Narragansetts under those regulations are entirely consistent with the Secretary's long-standing administrative practice.

III. The Secretary's Administrative Practice Has Been Consistent Across The IRA.

In addition to being consistent with the Secretary's historical administrative practice with respect to land acquisitions, the Secretary's actions here are consistent with – indeed are part and parcel of – the Secretary's broader

implementation of the IRA. At each point and in each regulation, the Secretary has defined eligibility for IRA benefits in terms of current recognition rather than recognition in 1934. *See, e.g.*, 25 C.F.R. § 5.1 (implementing 25 U.S.C. § 472); *id.* § 81.1 (implementing 25 U.S.C. § 476); *id.* § 163.1 (implementing 25 U.S.C. § 466). All of these provisions would of course be at risk if the State's unprecedented argument were to prevail. Nor are these the only programs at risk, as a host of provisions are defined to cover interests in land that are held by a Tribe (or by the United States for a Tribe), without any reference to status in 1934. *See* 25 C.F.R. § 162.101 (leasing and permitting tribal lands); *id.* § 166.4 (general grazing regulations); *id.* § 211.3 (leasing tribal lands for mining).

Moreover, the Secretary's implementation of the IRA in this regard is consistent with the Secretary's regulations across a range of Indian statutes, all of which define eligibility in terms of current recognition. *See, e.g.*, 25 C.F.R. § 20.100 (defining "Indian tribe" for implementation of Indian financial assistance and social services programs); *id.* § 23.2 (same for implementation of Indian Child Welfare Act); *id.* § 36.3 (same for minimum standards for basic education of Indian children in schools operated by the Bureau of Indian Affairs); *id.* § 39.2(o) (same for Indian School Equalization Program); *see generally* 25 U.S.C. § 476(f) (eliminating distinctions among Tribes and prohibiting the very distinctions that the State seeks to compel here).

In short, the State's focus on the Secretary's historical practice with respect to land acquisitions misses the larger context, in which the Secretary has consistently interpreted the IRA across a wide range of statutory programs and has harmonized that interpretation with Indian programs more broadly.

CONCLUSION

For the reasons stated here, and in the other briefs submitted by the Amici and the United States, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, hereby certify that I have this 6th day of February, 2007, caused copies of the Post-Argument En Banc Brief for Amici Curiae National Congress of American Indians, *et al.* in Support of Defendants-Appellees to be served by Overnight Mail or U.S. Mail (as indicated) on the following:

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