IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 03-2647

DONALD L. CARCIERI, in his capacity as Governor
of the State of Rhode Island; STATE OF RHODE ISLAND
and PROVIDENCE PLANTATIONS;
TOWN OF CHARLESTOWN, RHODE ISLAND

Plaintiffs-Appellants

v.

DIRK KEMPTHORNE*, in his capacity as Secretary of the
United States Department of the Interior
FRANKLIN KEEL, in his capacity as Regional Director of the
Bureau of Indian Affairs, U.S. Department of the Interior

Defendants-Appellees

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES ON REHEARING *EN BANC*

RYAN NELSON
Deputy Assistant Attorney General

WILLIAM B. LAZARUS
JUDITH RABINOWITZ
DAVID C. SHILTON
ELIZABETH ANN PETERSON #6517
Attorneys, Env't & Nat. Res.Div.
U.S. Department of Justice
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-3888

OF COUNSEL:

MARY ANNE KENWORTHY
Office of the Solicitor
U.S. Department of the Interior
Portland, OR 97232

* Dirk Kempthorne is substituted for Gale Norton pursuant to Fed. R. App. P. 43(c).

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INTRODUCTION

The State of Rhode Island ignores fundamental principles of federal Indian law and statutory construction in asking this Court to prevent the Narragansett Indian Tribe from exercising its inherent sovereignty over its members on 31 acres of land. The State offers this Court two alternative methods to achieve its goal of depriving the Tribe of any opportunity to assert its inherent sovereignty. On one hand, this

Court could substitute an interpretation of the Indian Reorganization Act that is inconsistent with the language and purpose of the statute, and contrary to the interests of Tribes, for the longstanding, reasonable interpretation of the Act by the agency charged with administering it. Alternatively, this Court could read into the Rhode Island Indian Claims Settlement Act a provision abrogating tribal sovereign authority in favor of State jurisdiction, even though that Act contains no such provision. Both of the State's alternatives contravene fundamental principles of statutory construction, and both are contrary to the well-established principle that federal Indian legislation must be interpreted for the Indians' benefit. A panel of this Court has correctly declined the State's offer, *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005) and the full Court should do the same.

BACKGROUND

This case is a challenge by the State of Rhode Island, the Governor of Rhode Island, and the Town of Charlestown, Rhode Island (hereinafter collectively the "State"), to a decision by the Secretary of the Interior to take 31 acres of land owned in fee by the Narragansett Tribe into trust for the Tribe for low-income housing . The United States currently holds in trust 1,800 acres of land (the "Settlement Lands"), which were granted to the Tribe pursuant to the Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701-1716 ("Settlement Act"), subject to the Settlement Act's requirement that the State's civil and criminal laws and jurisdiction would apply on the lands. The Tribe later acquired fee title to the additional 31 acres of land at issue ("Housing Lands") for the purpose of providing low-income housing for tribal members, and applied for trust acquisition of the property by the Secretary of

the Interior, who approved the request and directed that the lands be accepted into trust. (App. 16; App. 20). Because of the pendency of this challenge, for nearly nine years the Tribe has been unable to complete the construction of badly needed housing.

The State challenged the Secretary's decision arguing that Section 5 of the Indian Reorganization Act, 25 U.S.C. 465 ("IRA") did not authorize the Secretary to acquire the lands in trust for the Narragansett Tribe; that Section 5 was an unconstitutional delegation of legislative authority and that its exercise intrudes on the constitutional powers of states; that the trust acquisition of the Housing Lands was prohibited by the Settlement Act; and that the administrative record supporting the Secretary's decision to acquire the lands in trust demonstrated that the acquisition was arbitrary, capricious, or otherwise not in accordance with law.

On September 13, 2005,[1/] a panel of this Court rejected the State's constitutional challenges to Section 5 of the IRA, consistent with the other circuits that have addressed the constitutionality of Section 5. See, *e.g.*, *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, (8th Cir. 2005), cert. denied, 127 S.Ct. 67 (Oct. 12, 2006); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), cert. denied, 127 S.Ct. 38 (Oct. 2, 2006); *U.S. v. Roberts*, 185 F.3d 1125 (10th Cir. 1999); cert. denied, 529 U.S. 1108 (2000); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694, 698 (9th Cir.), cert. denied, 522 U.S. 1027 (1997). The panel also held that the IRA authorized the decision; that the Settlement Act did not

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[1/] The September 13, 2005, decision superseded an earlier panel decision issued on February 9, 2005.

foreclose it; and that the administrative record adequately supported the Secretary's decision to acquire the Housing Lands in trust for the Tribe. Judge Howard dissented in part, stating that the Housing Lands, like the Settlement Lands, should be subject to the State's civil and criminal laws and jurisdiction. *Carcieri*, 423 F.3d at 71.

The State seeks reversal of the panel's carefully-reasoned decision on two grounds: 1) that the Secretary lacks authority to acquire lands for tribes that were not in a recognized government-to-government relationship with the United States on June 18, 1934; and 2) that, in any event, the Settlement Act – which codified, *inter alia*, the Tribe's agreement that state civil and criminal law and jurisdiction would apply on the 1,800-acre Settlement Lands granted to it in that statute – precludes the exercise of tribal sovereignty over *any* lands within the state of Rhode Island. As explained below, the panel decision should be affirmed in all respects.

ARGUMENT

1. The Secretary is authorized by the IRA to acquire lands for recognized tribes without regard to the status of their acknowledgment in June of 1934.

The State invites this Court to depart from the uniformly held view that federally recognized tribes are entitled to participate in the programs and benefits of the IRA without regard to the government's acknowledgment of their status as tribes on the date of enactment of the IRA. In urging this departure, the State claims that "[t]he Panel Opinion is in direct conflict with the United States Supreme Court"and implies that an established body of law holds that the IRA authorizes land acquisition only for tribes that meet a "two prong test" that the State has fashioned to suit its goal of stopping the Tribe from acquiring 31 acres for low-income housing. But there is

neither such a "test" nor a body of law supporting such a test. The IRA authorizes – and indeed compels – the Secretary to treat all recognized tribes as equally eligible to participate in its programs and benefits, unless Congress has expressly provided otherwise. See 25 U.S.C. 476(f); 25 U.S.C. 476(g).[2/]

A. The panel's interpretation of the IRA is consistent with applicable principles of statutory construction.

(1) The panel's interpretation of the IRA is consistent with the Act's plain language and broad remedial purposes.

As explained in our response brief as appellee, the IRA was enacted as remedial legislation following the failed allotment and assimilation policy of the late nineteenth century (US Response at 36; US Response to Rehearing Petition at 7-8). The IRA applied to all tribes except those that elected, within one year (later extended a year), to opt out of its application (§ 18, 25 U.S.C. 478). In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the periods of trust or restrictions on alienation of Indian lands (§ 2, 25 U.S.C. 462), provided for the restoration of surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)), and prohibited any transfer of Indian lands (other than to the Tribe or by inheritance) except exchanges authorized by the Secretary as "beneficial for or compatible with the proper consolidation of Indian

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[2/] Section 476(f) provides that "[d]epartments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 * * * with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."

lands and for the benefit of cooperative organizations" (§ 4, 25 U.S.C. 464).

In addition, the IRA authorized or directed the Secretary to undertake specified steps aimed at improving the economic and social condition of Indians, including: acquiring real property "for the purpose of providing land for Indians" (IRA § 5, 25 U.S.C. 465); adopting regulations for forestry and livestock grazing on Indian units (§ 6, 25 U.S.C. 466); proclaiming new Indian reservations or adding to existing reservations with acquired lands (§ 7, 25 U.S.C. 467); assisting financially in the creation of Indian-chartered corporations (§ 9, 25 U.S.C. 469); making loans to Indian-chartered corporations out of a designated revolving fund "for the purpose of promoting the economic development" of the Tribes (§ 10, 25 U.S.C. 470); paying tuition and other expenses for Indian students at vocational schools (§ 11, 25 U.S.C. 471); and giving preference to Indians for employment in positions relating to Indian affairs (§ 12, 25 U.S.C. 472). The IRA also included provisions designed to strengthen Indian self-government, authorizing Indian Tribes to adopt their own constitutions and bylaws (IRA § 16, 25 U.S.C. 476), and to incorporate (§ 17, 25 U.S.C. 477).

The State contends that the Housing Lands cannot be acquired in trust, because the definition of "Indian" in the IRA prohibits the exercise of the Secretary's land-acquisition authority for the benefit of the Narragansett Tribe. The IRA defines as "Indian," *inter alia*, the members of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. 479. In 1934, the Narragansett Tribe was not federally

acknowledged.[3/] Although the Tribe is now federally recognized, and its continuous sovereign existence since the earliest contact with Europeans has been formally acknowledged, the State contends that the Tribe's members are not "Indians" for whom the Secretary may acquire trust land, because the IRA applies only to members of tribes that were both recognized and under federal jurisdiction on June 18, 1934, when the IRA was passed. The language of the statute does not compel this cramped reading, and the Secretary has consistently interpreted it to extend the programs and services established by the IRA to all members of recognized Indian tribes. Indeed, the Tribe's Settlement Lands were acquired in trust in 1988.

Section 479 of the IRA defines as "Indians" three groups of individuals. With a single exception, these groups are defined entirely in terms of their current status, not their status in 1934. Thus, Section 479 defines Indians as: (1) "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction;" (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;" and 3) "all other persons of one-half or more Indian blood." 25 U.S.C. 479 (emphasis added). The only situation in which the date of enactment is a factor is where a person claims to be an Indian on the basis of being the descendant of a member of a

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[3/] As we explained in our response brief as appellee the Tribe had organized as a state-chartered corporation in 1934, following the State's acquisition of the majority of the Tribe's lands in 1880. See US response at 5-6 &n.1. The Tribe later sued to recover its lands asserting that the State had acquired the lands in violation of the Trade and Intercourse Act of 1790, 25 U.S.C. 177, thereby rendering void the transfer of the Tribe's title to the lands. The Tribe's lawsuits were resolved with the enactment of the Settlement Act. See *infra*, pp. 18-20.

recognized tribe who resided on an Indian Reservation "on June 1, 1934." Id. The State argues that "now" as used in the first clause regarding members of recognized tribes must mean "on June 18, 1934." But Congress knew how to make clear its intent to use the date of enactment as a criterion, as shown by the language of the second clause. While the second clause looks backward to a specific date, the first clause is entirely forward looking. The phrase "now under Federal jurisdiction" in the first clause is simply used to modify the term "recognized Indian tribe"; that phrase, in turn, is used in a context that clearly refers to the current situation, not the situation in 1934 ("all persons of Indian descent who are members of any recognized Indian Tribe * * *"). 25 U.S.C. 479 (emphasis added). In this context, "now" can have no other meaning than the time at which a person claims that they "are" a member of a recognized Indian tribe. See, e.g. *Difford v. Secretary of Health & Human Services*, 910 F.2d 1316 (6th Cir. 1990) ("now" and "current" in statute require consideration of conditions at time of hearing); see also *Pierce v. Pierce*, 287 N.W. 879 (Iowa 1980) ("now" refers to time of filing petition for modification, not to date of enactment); *Larson v. American Title & Ins. Co.*, 52 So. 816 (Fla. 1951) (statutory word "now" denotes moment when act is read and applied, not time of act's passage).

(2) The Secretary's longstanding interpretation of the IRA is reasonable and entitled to deference.

The State argues that the applicable rule here is that "no administrative regulation or practice can overrule the clear language of a statute" (Pet. 14). It further asserts (Pet. 14) that the history of trust acquisitions demonstrates that the

Secretary historically interpreted "Indian" to include only members of tribes that were recognized in 1934. But, even assuming that the Secretary's authority in section 5 is cabined by the statutory definition of "Indian," and that the word "now" in that definition could limit the application of the statute to tribes that were recognized in 1934, the statute is ambiguous as to whether a member of a tribe later acknowledged as having been entitled to federal recognition in 1934 is an "Indian" for purposes of the statute's benefits.

The Secretary's reasonable interpretation simplifies the question: the authority to acquire lands for Indians applies to tribes that are federally recognized "now" when the authority is invoked. This interpretation is consistent with both the language of the statute and the broad remedial purposes of the IRA, which encompassed both ending the loss of lands by Indians and reestablishing and revitalizing government-to-government relations between the United States and Indian groups. 25 U.S.C. 461, 476; see Solicitor's Opinion, M-27810 (December 13, 1934), 1 Op. Sol. Indian Affairs at 489.

Congress granted the Secretary broad authority to implement the statute, and the Secretary has consistently applied this reasonable interpretation of the statutory language. Accordingly, to the extent that the word "now" renders the statute ambiguous with respect to the Secretary's authority to extend the benefits of the IRA to the members of tribes that were not federally recognized on June 18, 1934, the Secretary's interpretation is entitled to substantial deference. *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996) ("Congress, when it left ambiguity in a statute * * * understood that the ambiguity would be resolved, first and foremost, by the agency,

and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"). And see, *e.g.*, *Johnson v. Apfel*, 191 F.3d 770, 775-76 (7th Cir. 1999) (Social Security Administration's interpretation of statutory terms "now" and "currently" entitled to deference).

The State questions the panel's reliance on the Secretary's longstanding interpretation, and points (Pet. 14) to evidence that the authority to take land into trust has been invoked only infrequently for tribes that were not recognized in 1934 as proof that the Secretary historically believed that such acquisitions were not authorized.[4/] This anecdotal evidence proves nothing of the kind. The State has offered no suggestion that the Secretary has ever *declined* a request for trust acquisition on the ground that the tribe making the request was not recognized in 1934. Moreover, it has offered no evidence that the fact of a tribe's 1934 recognition was a relevant factor, let alone a significant one, in any decision by the Secretary to acquire lands in trust for any tribe. Indeed, the State admits (Pet. 14) that the Secretary has invoked the authority to acquire lands in trust for tribes that were not

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[4/] The State's theory reveals a fundamental misunderstanding of Indian history. Until the 1970's, very few previously-unrecognized groups requested federal recognition. In 1978, Interior first issued the regulations now found at 25 C.F.R. § 83.3(a), establishing a process for acknowledgment as tribes of Indian groups that can establish a "substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." Interior therefore could not have acquired lands for tribes acknowledged pursuant to this process prior to the 1980's, when the first seven tribes were acknowledged. See, *e.g.*, GAO Report, GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, Appendix I to US Rehearing Response, at 24.

recognized in 1934, even accepting its characterization (*id.*) of these acquisitions as "a spot exception or two." Without exception, however, the tribes for which land has been acquired in trust were federally recognized when the acquisition was made. This is because the Secretary interprets the definition of "Indian" to extend to members of tribes recognized at the time the statute is invoked, regardless of the tribes' recognition status in 1934. See, *e.g.*, *Jack and Shirley Baker v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 164, 179 (1991) ("Appellants come within the IRA definition because they are members of a recognized Indian tribe under Federal jurisdiction."); accord, *Zarr v. Barlow*, 800 F.2d 1484, 1488 (9th Cir. 1986).

(3) The IRA as a whole, and subsequent Congressional enactments, support the Secretary's interpretation.

The State's theory also is at odds with the fact that, in the many decades since Congress enacted the IRA, Congress not only has taken no action supporting a narrow interpretation of the authority granted in section 465, but instead has stated that the IRA should be interpreted broadly. Indeed, in 1994, Congress amended the IRA to prohibit the Secretary from distinguishing among recognized tribes with regard to the privileges and immunities afforded such tribes. See 25 U.S.C. 476 (f) & (g). Particular deference is due a statutory interpretation by the agency charged with executing the statute where Congress has refused to alter the administrative construction. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969). In amending the IRA in 1994, Congress not only refused to alter the Secretary's interpretation, but effectively ratified and extended it. The Secretary's construction

accordingly is entitled to "particular deference," as the panel correctly concluded. *Carcieri*, 423 F.3d at 54.

Similarly, in the Indian Land Consolidation Act, 25 U.S.C. 2202 ("ILCA"), Congress defined "tribe" more broadly than does the IRA, and explicitly stated that the authority to acquire lands under IRA section 465 should extend to all tribes, notwithstanding section 478, which provides that the IRA does not apply to tribes that voted against its application to them. The ILCA further provides that this authority is not intended to "supersede any other provision of federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)," such as the Maine Settlement Act. *Id*.[5/] The State's interpretation of 25 U.S.C. 479 is in clear tension with the intent expressed in the ILCA to authorize trust land acquisition for *all* tribes, except where federal law has limited the Secretary's authority with respect to "specific" tribes, reservations or states, and also with the Federally Recognized Indian Tribe List Act ("List Act"), Pub.L. No. 103-454, 108 Stat. 4791 (1994) and the 1994 amendments.[6/]

[5/] The House Report accompanying ILCA explains that this proviso was added to clarify that the acquisition authority was not intended to extend to tribes in Maine where the land claims settlement act had dealt comprehensively with land acquisition issues. H.R. Rep. No. 97-908, at 14 (1982). All of the Maine tribes were acknowledged after 1934; and Congress therefore clearly understood that the Secretary's trust acquisition authority generally extended to tribes acknowledged after1934. Significantly also, the report does not identify the Rhode Island Indian Claims Settlement Act as imposing a comprehensive land acquisition scheme like that of the Maine Act.

[6/] The State incorrectly suggests (Pet. 12) that the panel concluded that a

(continued...)

These statutes make clear that Congress expects the Secretary generally to treat all federally recognized tribes alike, without regard to their acknowledgment status in 1934. Under the State's interpretation, there would be significant differences between the benefits and services available to tribes that were recognized in 1934 and those, like the Narragansett, that have later been determined to have existed autonomously as tribes from pre-colonial times but were not federally-recognized tribes in 1934. See *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir.1994). This Court should reject the State's interpretation, which cannot be reconciled with congressional policy as expressed in later enactments and should instead defer to the Secretary's interpretation of the IRA.

B. There is no conflict of judicial authority regarding the scope of the Secretary's authority to acquire lands for Indians.

The State urges this Court (Pet. 2) to conclude that "the IRA does not apply to Indians or tribes who were not both federally recognized and under federal jurisdiction as of 1934, unless there were Indians of one-half or more Indian blood applying for inclusion." The State asserts (Pet. 2, 6) that because the panel declined to read this "temporal limitation" into the IRA's grant of authority to acquire trust lands, the panel's opinion "conflicts" with *United States v. John*, 437 U.S. 634 (1978), *United States v. State Tax Comm'n of Mississippi*, 505 F.2d 633 (1974), and

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[6/](...continued)
"temporal limitation" has been amended out of section 479 of the IRA. To the contrary, the panel rejected the slim evidence offered by the State to support the existence of such a limitation in favor of an interpretation that is consistent with that of the Secretary and with Congress's apparent understanding of the scope of the IRA's provisions.

Kahawaiola'a v. Norton, 386 F.3d 1271 (9th Cir. 2005). There is no such conflict.

In *State Tax Comm'n*, the Fifth Circuit addressed the question whether certain lands held in trust for the Mississippi Choctaw Indian Tribe were "Indian Country" for jurisdictional purposes. The State of Mississippi argued that the lands were not Indian Country, regardless of a proclamation that they constituted a "reservation," because, in its view, an administrative action by the Secretary of the Interior could not restore tribal status that had been terminated by treaty. See 505 F.2at 642, 43. The Fifth Circuit determined that "the matter boils down to whether the Mississippi Choctaws became a tribe and live on a reservation as the result of the [IRA] and the Proclamation of the Department of the Interior issued in 1944." 505 F.2d at 642. Finding that "tribal status is to be determined as of June, 1934," the Fifth Circuit concluded that the "answer to both issues is in the negative." *Id.*

The Supreme Court reversed in *John*, 437 U.S. 634.[7] It observed that

> [t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were *at that time* under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation" * * * at that particular time.

Id., 437 U.S. at 649. The Court further concluded that, "if there were any doubt about the matter in 1939," when Congress declared the lands to be held in trust, "the situation was completely clarified by the [Secretary's] proclamation in 1944 of a

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[7] The United States did not seek *certiorari* in *State Tax Commission*, although the Court had incorrectly concluded that the Mississippi Choctaws are not a tribe, because this conclusion was unnecessary to the Court's resolution of the case. See *John*, 560 F.2d at 1205.

reservation." *Id.* Then, "[a]ssuming for the moment that authority for the proclamation [that the lands were an Indian reservation] can be found only in the 1934 Act," the Court went on to repudiate the lower court's reasoning with respect to the application of the IRA to the Choctaw Tribe, noting that the Act clearly was intended to reach Indians other than members of tribes recognized in 1934, including "persons of one-half blood or more." *Id.* at 649-680.

John does nothing to bolster the State's theory that the Secretary's authority to take land into trust under the IRA is limited to groups that were recognized in 1934, and strongly suggests that such a narrow reading of the statutory language would have been disfavored. Moreover, because the Supreme Court concluded that the Fifth Circuit had wrongly applied the IRA, the Court had no occasion to consider whether, in some other circumstance, it might have agreed that the Secretary's authority under the IRA to acquire lands for Indians could be exercised only on behalf of tribes recognized in 1934. Accordingly, neither *Tax Comm'n* nor the hypothetical discussion of it in *United States v. John*, 437 U.S. at 649-50, provides authority for such an interpretation.

The State similarly misplaces reliance on *Kahawaiola'a v. Norton*, 386 F.3d 1271 (9th Cir. 2004), in which Native Hawaiians challenged regulations governing the acknowledgment of Indian groups as tribes on the ground that the regulations' exclusion of Native Hawaiians constituted a violation of the Constitution's equal protection guarantee. Native Hawaiians are explicitly *excluded* from the IRA, and the Court concluded that Native Hawaiians need not be permitted to seek acknowledgment as Indian tribes, because of the significant historical and geographic

differences between the United States' relationships with the two aboriginal groups.

The State seizes (Pet.11) on the Ninth Circuit's passing observation in that case that "[t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii," 386 F.3d at 1280, as supposed "agreement" by that court that the IRA reaches only tribes that were recognized and under federal jurisdiction in 1934. To the contrary, nothing in *Kahawaiola'a* addresses the application of the IRA to non-Hawaiian groups; indeed, the court expressly stated that it was *not* concerned with any legal distinction between Indian groups in the forty-eight contiguous states:

> We do not think that the difference between the two groups [recognized and non-recognized] of native Americans domiciled in the continental United States is of legal significance for purposes of our opinion. The critical factor is the similarity of the geographic and historical circumstances of indigenous native American groups, federally recognized as Indian tribes or not, and the contrast between those circumstances and the geographic and historic circumstances of native Hawaiians as a whole.

Id. at 1281 n.5. In short, *Kahawaiola'a* did not address the question whether the IRA applies to persons who are not members of tribes recognized in 1934 and provides no support for the State's narrow interpretation of the IRA.

No authority compels the State's interpretation of the IRA, and the statute's language and purpose make clear that the Secretary's IRA authority extends to the Narragansett Indian Tribe regardless of the status of its acknowledgment in 1934. The State's "two-prong test" would afford benefits to groups that were recognized as tribes in 1934, but whose government-to-government relationship with the United States has since been terminated, while excluding tribes such as the Narragansett that have established their continuous tribal existence since pre-colonial times. And,

despite the State's assertions (Pet. 2) that "all courts" agree with its reading of the statute, the State in fact invites this Court to establish for the first time a rule that IRA benefits are to be accorded or withheld on the basis of the government's acknowledgment, in 1934, of a group's tribal status. This Court should decline the State's invitation, and should defer to the Secretary's sound interpretation.

2. The Settlement Act did not abrogate the Tribe's sovereign powers or its right to acquire lands in Rhode Island over which it may exercise sovereignty.

The State maintains (Pet. 2, 16-20) that when the Tribe settled its land claims, it also negotiated away both its rights under federal law to have land held in trust by the United States and the United States' statutory authority to acquire land in trust for the Tribe in Rhode Island. The State's position finds no support in the language of the Settlement Act and is premised on a misunderstanding of basic concepts of federal Indian law. Essentially, the State conflates the concepts of Indian title and Indian sovereignty, and attempts to show that by ceding Indian *title* throughout the state of Rhode Island the Tribe ceded for all time its ability to exercise "*territorial sovereignty*" within the State. Federal law is to the contrary; indeed, the IRA was enacted to remedy the dire consequences of the policy of tribal land cession and allotment throughout the United States, as discussed above (*supra,* pp. 5-6), by allowing tribes, *inter alia*, to reorganize their governments and reestablish sovereign territory. Moreover, the agreement on which the Settlement Act was based explicitly acknowledged the Tribe's retained right to seek federal acknowledgment. The Tribe's agreement to extinguish its land claims and to accept State civil and criminal law and jurisdiction on the 1,800-acre parcel the Tribe received in the settlement, in

other words, did not affect the Tribe's future rights under the IRA, which the Settlement Act did not address. The question whether the Secretary may acquire the Housing Lands in trust for the Tribe, therefore, is beyond the scope of any provision of the Settlement Act, as are the legal consequences of the trust acquisition.[8/]

The State now seeks to expand its authority under the Settlement Act by characterizing the acquisition of trust land as an assertion by the Tribe of sovereign powers over lands located within the State, which the State further characterizes as a "claim involving land" extinguished by the Settlement Act. But neither the Tribe nor the United States has made any "claim" involving the Housing Lands at issue in this case. The 31-acre parcel was purchased in fee by the Tribe, and the Secretary has decided to accept the land in trust pursuant to the pertinent regulations. Therefore even if the Settlement Act "guaranteed" that the laws and jurisdiction of the State would apply on the Housing Lands by virtue of the Tribe's agreement to extinguish "claims involving land," it had no impact on the decision to take the Housing Lands into trust. The State's theory is fundamentally unsound.

[8/] This Court has previously considered the question whether the Housing Lands parcel is subject to State law and jurisdiction, or whether it is instead "Indian Country." *Narragansett Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908, 920 (1996). Applying the factors for "Indian Country" as defined in 18 U.S.C. 1151, this Court concluded that in the absence of "[s]uperintendence by the federal government," the Housing Lands were not Indian Country. This Court further stated, however, that, "[w]ere the land placed in trust with the United States, this factor would have been met." *Narragansett Electric*, *id.* at 920. Therefore, unless the Settlement Act precludes the creation of Indian Country in Rhode Island, once in trust, the Housing Lands will be subject to Indian Country jurisdiction, which generally excludes state civil and criminal law.

The Settlement Act resolved litigation in which the Tribe claimed ownership of the lands on the ground that the State's purported acquisition of lands from the Tribe was ineffective, because it was prohibited by federal law. In the resulting bargained-for exchange, the Tribe agreed to abandon its land claims throughout the state, in exchange for, *inter alia*, title to 1,800 acres of "Settlement Lands" within the State, which would be subject to the civil and criminal laws and jurisdiction of the State. Nothing in the Settlement Act or the agreement that it codified suggested any greater cession of rights by the Tribe, or that Congress intended to enact prospective legislation affecting issues that were not negotiated by the parties, such as the later acquisition of trust land by the Tribe in the event of its federal acknowledgment.

Despite the Act's complete silence with respect to the Tribe's later acquisition of lands outside the Settlement Lands, the State interprets the Settlement Act as effecting an extinguishment of the "territorial sovereignty" of the now-recognized Tribe throughout Rhode Island. The State argues (Pet. 18) – contrary to this Court's and the Supreme Court's precedents – that aboriginal title is more than a mere possessory interest in land, and that the Tribe's settlement of its land claims therefore encompassed a permanent cession of its powers of "territorial sovereignty" in Rhode Island. Having thus redefined both "claims involving land" and "aboriginal title" the State urges this Court to conclude (Pet. 20) that the Settlement Act extinguished the Tribe's "territorial sovereignty," and "guaranteed that State law will apply throughout the State." This conclusion, however, finds no support in the law.

In the Settlement Act, Congress codified the parties' negotiated agreement that the Settlement Lands would be subject to state civil and criminal laws and jurisdiction

after the lands were transferred to a state corporation in trust for the Narragansett community. 25 U.S.C. 1708.[9/] It also extinguished land claims by Indians arising from their aboriginal occupancy of lands throughout Rhode Island. The State wrongly asserts (Pet. 17-19) that the Settlement Act's language extinguishing claims by the Narragansetts or "any successor in interest" based upon "any interest in," or "right involving" land in Rhode Island "is an express limitation on the reach of tribal territorial sovereignty," because it prohibits all "uniquely Indian" claims to land in Rhode Island. The State relies (Pet. 18) on its own unique theory: that the "exercise of territorial sovereignty is an inherent attribute of aboriginal title." The State is flatly wrong. It is well established that aboriginal title is merely a possessory interest, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (taking claim based on aboriginal title not compensable);, and that it has no inherent sovereign attributes. Sovereignty inheres in Tribes, which may exercise it over their territory and their members, whether or not they hold aboriginal title to that territory. See, e.g., *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1994), cert. denied, 513 US. 919 (1994). Accordingly, the cession of aboriginal title cannot alone extinguish a Tribe's power to exercise territorial sovereignty.

Nor does *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), support the State's theory. The Supreme Court there considered whether an Indian

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[9/] 25 U.S.C. 1708 provides that "[e]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Section 1702(f) defines "settlement lands" as the 1800 acres to be acquired for the Narragansett community from the State and private landowners.

tribe that had not asserted sovereignty over its historical reservation for 200 years could convert the lands within the reservation to "Indian Country" by purchasing them in fee, following a decision that the reservation had not been disestablished, thus uniting aboriginal and fee title to the lands. The Supreme Court concluded that, under the unusual circumstances presented in that case, laches prevented the Oneida Indian Nation from asserting its tribal sovereignty over the land. *Sherrill*, 544 U.S. at 221. It did not, however, express the view that the Tribe's territorial sovereignty was inherent in aboriginal title, contrary to the State's assertion here (Pet. 18). As the State correctly points out, however (Pet. 19), the Court in *Sherrill* observed that Congress had provided an appropriate mechanism for reassertion of sovereign authority over the Tribe's historical territory by enacting the trust acquisition provision of section 5 of the IRA. *Sherrill*, 544 U.S. at 220. The Narragansetts have employed that mechanism here. And, consistent with *Sherrill*, Narragansett Tribe is entitled to assert sovereign authority over trust lands so acquired.

Moreover, *Sherrill* supports the proposition that the Secretary is authorized to acquire lands in trust for tribes, and that the lands so acquired may be Indian Country, in the absence of an express Congressional directive to alter that status. Contrary to the State's assertions (Pet. 17-20), the Settlement Act contains no such Congressional directive. Neither the Joint Memorandum of Understanding ("JMOU") that led to the Settlement Act nor the Act itself contained a "guarantee" that state laws and jurisdiction would continue to apply "throughout the state."

If Congress had intended the Settlement Act to limit the Tribe's ability to assert sovereignty over later-acquired trust lands, it would have made its intent explicit, as

it did in the Maine Settlement Act. See 25 U.S.C. 1724(e). As the Second Circuit found in *Connecticut ex rel. Blumenthal v. United States Dep't of Interior*, 228 F.3d 82, 90 (2d Cir. 2000), "[t]he absence of an analogous provision in the Settlement Act at issue in this case confirms that the Settlement Act was not meant to eliminate the Secretary's power under the IRA to take land purchased without settlement funds into trust for the benefit of the Tribe." Similarly, the language of the Settlement Act at issue here contains no limitation on the acquisition of lands or the assertion of Indian sovereignty outside the Settlement Lands.

In sharp contrast to the Maine Settlement Act, 25 U.S.C. 1724(e), which expressly precluded application of section 5 of the IRA, the Rhode Island Settlement Act neither precluded the Tribe from acquiring lands outside the Settlement Lands, nor precluded the Secretary from holding such lands in trust for the Tribe's benefit. Indeed, the Rhode Island Settlement Act does not even reference the IRA, although the JMOU it implements expressly provided that the Tribe would "have the same right to petition for [Department of the Interior] recognition and services as other groups," and the Settlement Act explicitly anticipated that the Tribe may eventually be federally acknowledged. 25 U.S.C. 1707(c). Neither the JMOU nor the Settlement Act addressed the Tribe's inherent sovereignty or the Secretary's authority to acquire lands in trust for the Tribe. In these circumstances, as the Supreme Court observed in *Sherrill*, "Congress has provided [in 25 U.S.C. 465] a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being." 544 U.S. at 220. The panel therefore correctly concluded that "the Secretary of the Interior is not prohibited by

the Settlement Act from taking the [Housing Lands] Parcel into unrestricted trust" for the benefit of the Narragansetts pursuant to 25 U.S.C. 465. *Carcieri*, 423 F.3d at 66.

Interpreting the Settlement Act as a prohibition on future trust land acquisitions for the benefit of the Tribe, in the absence of any statutory provision containing an express prohibition of such trust acquisitions, moreover, would require a conclusion that the Settlement Act impliedly repealed section 5 of the IRA with respect to the Tribe. Such an interpretation is impermissible under well-established canons of statutory construction. First, "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). In *Morton*, plaintiffs argued that a later-enacted statute was intended to repeal a "longstanding, important component of the Government's Indian program." *Id.* at 550. In rejecting the plaintiffs' argument, the Supreme Court held that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456-57 (1945)). Here, there is no conflict between the Settlement Act, which provided for State jurisdiction within the Settlement Lands, and the IRA, under which the Housing Lands may be Indian Country without displacing any provision of the Settlement Act. As the Supreme Court explained in *Morton*, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* at 551. See also *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

The Settlement Act's extinguishment provisions reasonably may be interpreted – and clearly were intended to be understood – as extinguishing only Indian land claims based on the possessory rights that gave rise to the Narragansetts' lawsuits. Moreover, even assuming that the provisions created ambiguity in this regard, statutes "are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, *supra*, 534 U.S. at 93-94. In particular, statutes that impact upon Indian sovereignty are viewed from a "distinctive perspective." *Narragansett Indian Tribe of R. I.*, 89 F.3d at 914 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d at 691). The State's interpretation would deprive the Tribe of significant rights and falls well outside of these long-established rules of statutory construction.

The State's theory is both unreasonable and contrary to law. It argues that "wall-to-wall" extinguishment of "land claims," coupled with the Settlement Act's provision that the Settlement Lands would be subject to state laws and jurisdiction, impliedly repealed the Secretary's authority under section 5 of the IRA to acquire lands in unrestricted trust for the Tribe. The State, in other words, would have this Court conclude that the Settlement Act should be construed to deprive the members of the federally recognized Narragansett Tribe of Indians of critical Indian programs and benefits provided under the IRA, contrary to fundamental principles of statutory construction and federal Indian law. Longstanding principles of law require this Court to defer to reasonable agency interpretations of the statutes they are charged with administering and to construe statutes for the benefit of the Tribe. These principles dictate that the State's challenge to the Secretary's decision to acquire the

Housing Lands in trust for the Tribe must be rejected, and that the panel's decision should be upheld in all respects.

CONCLUSION

For these reasons and those set forth in the Federal Appellees' prior briefs, the panel correctly decided this appeal, and the judgment of the district court should be affirmed.

Respectfully submitted,

RYAN NELSON
Deputy Assistant Attorney General

WILLIAM B. LAZARUS
JUDITH RABINOWITZ
DAVID C. SHILTON
ELIZABETH ANN PETERSON #6517
Attorneys, Env't & Nat. Res.Div.
U.S. Department of Justice
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-3888

OF COUNSEL:

MARY ANNE KENWORTHY
Office of the Solicitor
U.S. Department of the Interior
Portland, OR 97232

DECEMBER 2006
90-6-24-00864

CERTIFICATE OF SERVICE

I certify that on December 22, 2006, copies of the Supplemental Brief for the Federal Appellees on Rehearing *En Banc* were served upon counsel by placing the same in the United States Mail, postage prepaid and addressed as follows:

Neil Kelly
Assistant Attorney General
150 South Main Street
Providence, RI 02903

Claire Richards
Executive Counsel
Room 119, State House
Providence, RI 02903

Joseph Larisa, Jr.
Assistant Solicitor
One Citizens Plaza, Suite 1100
Providence, RI 02903

John F. Killoy, Jr., Esq.
74 Main Street
Wakefield, RI 02879

Anthony Gioia
Assistant United States Attorney
50 Kennedy Plaza, 8th Floor
Providence, RI 02903

_____
Elizabeth Ann Peterson
Attorney, Department of Justice