UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LINCOLN C. ALMOND, 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.	)	Civil Action No. 00-375-T
v.	)	
GALE A. NORTON, in her capacity as Secretary of the Department of the Interior, United States of America, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs, within the Department of the Interior, United States of America, Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

POINTS AND AUTHORITIES

Federal defendants hereby oppose plaintiffs' Motion for Summary Judgment. For the reasons set forth below, plaintiffs have failed to show that they are entitled to summary judgment. Therefore, plaintiffs' motion should be denied and federal defendants' cross Motion for Summary Judgment should be granted.

UNDISPUTED FACTS

Pursuant to this Court's pre-trial order, plaintiffs and federal defendants filed separate Statements of Undisputed Facts ("SUF").[1/] While federal defendants do not agree with the characterizations and/or the unstated inferences suggested by some of plaintiffs' listed facts, these disagreements do not rise to the level of disputes over material facts that would preclude this Court granting summary judgment for federal defendants. Federal defendants will provide the Court with their views on the legal significance, if any, of various facts set forth in plaintiffs' SUF, in the body of this memorandum.

I. THE SECRETARY'S DECISION IS FULLY CONSISTENT WITH THE APA

Plaintiffs allege that the Secretary's decision to approve the Tribe's trust application was an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). Ps' Br. 23-30. Plaintiffs' claim is clearly contravened by the Administrative Record of the challenged decision, which shows that the Area Director, acting pursuant to authority delegated by the Secretary, considered all the relevant legal factors and made an eminently reasoned decision.

To demonstrate that an agency has engaged in an abuse of discretion, a plaintiff must show that the agency has not considered "the relevant factors and . . . [that] there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989). Moreover, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Overton

[1/] Plaintiffs rejected federal defendants suggestion that the parties negotiate, or at least attempt to negotiate, a joint Statement of Undisputed Facts in order to facilitate the Court's consideration of this case which is fundamentally a legal, rather than fact dispute.

Park, 401 U.S. at 416; Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1445-46 (1st Cir. 1992); Massachusetts v. Andrus, 594 F.2d 872, 888 (1st Cir. 1979) (so long as the Secretary's determinations are within the law, are based upon consideration of relevant factors, and do not involve clear errors of judgment, a court may not substitute its view). Plaintiffs have not met their burden to show that the Secretary made a clear error of judgment under the deferential review standards of the APA. Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1992) (characterizing APA review standard as "highly deferential" and instructing that "the court must presume the agency action to be valid"). The decision at issue here is thoroughly grounded in the relevant law and regulations, has been upheld by the Interior Board of Indian Appeals ("IBIA"), and should be upheld by this Court.

A. The Secretary Properly Applied the Part 151 Factors

1. The Agency Consideration of the Relevant Factors Was Independent and Searching

Plaintiffs begin their assault on the Secretary's decision to approve the Tribe's trust application by erroneously asserting that the Bureau treated the Tribe's 31-acre parcel as "on-reservation" under 25 C.F.R. Part 151. Ps' Br. 24. In fact, the Bureau correctly evaluated the Tribe's application under the 25 C.F.R. § 151.11 "off-reservation" factors and the incorporated § 151.10 "on-reservation" factors. AR Vol. II, Tab II, p. 1. Next, plaintiffs launch an exaggerated attack on the Bureau because the staff-level memorandum recommending approval of the Tribe's application, AR Vol. II, Tab II, adopted much of the Tribe's well founded and well articulated letter in support of the proposed trust acquisition. In this connection, plaintiffs wrongly claim that the BIA "entirely failed" to consider events relevant to the Tribe's application that occurred between 1993 and 1997. Ps' Br. 24.

Plaintiffs conveniently ignore that several additional officials within the Bureau evaluated aspects of the Tribe's original 1993, and subsequent 1997, trust application together with many other documents and issues in connection with these applications. That the Bureau's Realty Specialist determined -- at least with respect to the non-environmental Part 151 factors -- that he could not improve upon the Tribe's articulation of how its application satisfied the regulatory factors is not, as plaintiffs

suggest, arbitrary "textual embezzlement," Ps' Br. 24, but rather a rational adoption of reasonable analysis.

Plaintiffs' assertion that the BIA did not consider events between 1993 and 1997 is clearly refuted by the Administrative Record. Plaintiffs highlight the Narragansett Indian Tribe v. Narragansett Electric Co., litigation, 89 F.3d 908 (1st Cir. 1996), rev'g in part and aff'g in part, 878 F. Supp. 349 (D. R.I. 1995), environmental and jurisdictional issues, and plaintiffs' comments to the Bureau on the proposed trust acquisition, as matters purportedly ignored by the Bureau. Ps' Br. 24. The Record, however, shows that between 1993 and 1997, the Bureau, inter alia, required the Tribe to supplement its initial Environmental Assessment ("EA"), AR Vol. I, Tab S; conducted an environmental hazard survey of the subject 31-acre parcel, AR Vol. III, Tab U (Ex. 19); required confirmation of consistency with the State's Coastal Resources Management Plan ("CRMP"), AR Vol. II, Tab C (Ex. 10); was well aware of the Narragansett Electric litigation, AR Vol. I, Tab Y (Ex. 4); was apprised of, and offered to facilitate, negotiations between the Tribe, the Town, and the State concerning both environmental and jurisdictional issues attendant to the Tribe's development of the parcel, AR Vol. I, Tab J; and specifically requested that the Regional Solicitor address several legal and jurisdictional issues raised by plaintiffs in their comments to the Bureau on the Tribe's trust application. AR Vol. II, Tab K. In short, plaintiffs cannot substantiate their claim that the Bureau failed to consider factors relevant to the Tribe's application.

2. The Administrative Record Contains Clear Articulations of the Need For the Parcel

In a revealing admission that the Indian Reorganization Act ("IRA") indeed reflects intelligible congressional policy principles,[2/] plaintiffs argue that the Secretary abused her discretion by not abiding Congress' intent that the Secretary's section 5 authority be used to acquire land needed by Indians. Ps'

[2/] Plaintiffs only acknowledge these well founded policy principles when it serves their needs. For example, in an attempt to support their claim that the IRA violates the nondelegation doctrine, plaintiffs change their position and assert that "[t]he only limitation in § 465 on the Secretary's trust-taking authority is that the trust acquisition must be 'for the purpose of providing land for Indians,'" which, they maintain, does not supply an intelligible principle to guide the Secretary. Ps' Br. 20.

Br. 25. Though plaintiffs are correct in their observation that the IRA is underlined by, inter alia, the policy of providing land for Indians in need, they incorrectly attempt to cabin that policy objective. Plaintiffs suggest that the Secretary only has authority to acquire land in trust for Indians who are either "landless" or whose lands are inadequate to support them. Ps' Br. 25. Plaintiffs' selective citation to the legislative history of the IRA does not demonstrate that the Secretary's section 5 authority is so constrained. In fact, the IRA was passed to remedy a broad set of tribal needs, including "economic development, self-determination, cultural plurality, and the revival of tribalism."[2/] F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.). As explained in a House Report, "broadly, the [IRA] proposes to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R.Rep. No. 1804, 73rd Cong., 2d Sess. 6 (1934).

In any event, plaintiffs are simply wrong in their assertion that the Bureau failed to consider the 25 C.F.R. § 151.10(b) "need for additional land" factor. The record is replete with references to the Tribe's need for this parcel for low income and elderly housing for its members. AR Vol. I, Tab B; AR Vol. II, Tab C, p. 5; AR Vol. II, Tab H, p. 2; AR Vol. II, Tab O. Plaintiffs also ignore the findings of another federal agency -- the Department of Housing and Urban Development ("HUD") -- which were predicate to HUD's funding of the Tribe's purchase and initial development of the parcel for low-income housing. Town of Charlestown v. E. Area Dir., BIA, 35 IBIA 93, 95 (2000) (citing Tribe's explanation that HUD funding rested on determination of need to remedy shortage of safe and sanitary housing for low-income housing). As one HUD official explained, "lands authorized under the Indian housing program and funded by this agency for purchase by any housing authority is done so with *very specific justification of need.*" AR Vol. I, Tab Y (Ex. 3) (emphasis added). See also Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 878 F. Supp. 349, 356 (D. R.I. 1995) (noting "a need recognized both by HUD and the Tribe").

[2/] In reference to land, Cohen's Treatise notes that "[t]he Act was intended to stop the alienation of tribal lands needed to support Indians, and to provide for acquisition of additional acreage for tribes." F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.).

The Administrative Record also contains HUD correspondence explaining that although the Tribe's Housing Authority was awarded funding for housing units in 1988, a "lack of suitable land for housing" prevented the initiation of housing construction. As is further explained, HUD provided funding for the purchase of the needed suitable housing lands. AR Vol. I, Tab B. Another HUD communication clarifies that HUD actually "directed" the Tribe's Housing Authority to have the HUD-financed housing lands immediately placed in trust through the Department of the Interior. AR Vol. I, Tab Y (Ex. 3).

Thus, contrary to plaintiffs' assertion, Ps' Br. 25, the Administrative Record shows that the Secretary's decision is based on far more than just the Tribe's representation that it needs the land. In addition to the Tribe's specific need for the land at issue, the Bureau's land acquisition policy singles out Indian housing as a particularly compelling factual predicate for trust acquisition by the Secretary. See 25 C.F.R. § 151.3(a)(3) (Secretary may acquire land in trust status when necessary to "facilitate tribal self-determination, economic development, *or Indian housing*"). Plaintiffs' claim that the Record is devoid of consideration of the Tribe's need for the subject land is baseless and must be rejected.

3. Jurisdictional Issues Were Given Extensive Consideration

Plaintiffs next complain that the Tribe requested the Secretary to take its housing parcel into trust "free of State law and regulation," Ps' Br. 26, implying that there is something remarkable about this fact. In fact, in those states that are not "P.L. 280" states,[4/] it is well-settled that transfer of off-reservation tribally-owned land into trust effects a shift away from primary state jurisdiction to primary tribal and federal jurisdiction.[5/] See, e.g, Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). In a further erroneous leap, plaintiffs suggest that the Tribe's request implies that the Secretary has the option of imposing State jurisdiction on the Tribe's housing lands. Plaintiffs cite 25

[4/] P.L. 280 encompasses two statutes, one criminal and the other civil, granting jurisdictional authority to six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) over Indians within certain areas of Indian country. Act of August 14, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[5/] Primary federal/tribal jurisdiction is not, as plaintiffs assume, Ps' Br. 15-16, the same thing as exclusive federal jurisdiction that may characterize true federal enclaves. See infra Part IV. A.

C.F.R § 1.4 as support for this proposition.[6/] Ps' Br. 26 n.33.

The Administrative Record contains a detailed analysis of this theory previously advanced by plaintiffs. In November 1997, in response to the Eastern Area Director's request for a legal opinion on plaintiffs' proposed conditions for trust acquisition of the Tribe's parcel, the Regional Solicitor, Southeast Region, opined, inter alia, that the Bureau has no authority to subject the parcel to the civil and criminal jurisdiction of Rhode Island. AR Vol. II, Tab K, p. 2. Specifically, the Regional Solicitor explained that 25 C.F.R. § 1.4(b) "does not purport to effect changes in the fundamental jurisdictional status of the Indian land" and that the Bureau "may not presume to make Indian land subject to state civil and criminal jurisdiction," a "prerogative that has been reserved to Congress, [which] may not be usurped administratively." Id. (citing 25 U.S.C. § 1321 et seq. (granting consent of the United States to the states to assert criminal and civil jurisdiction over Indian lands upon the consent of the affected tribe); Kennerly v. District Court of Montana, 400 U.S. 423, 424 n. 1 (1971) (holding that a tribe may not grant civil jurisdiction to a state absent congressional authorization)). As the Regional Solicitor outlined, the Secretary has no authority to administratively condition the taking of Indian land into trust on the continuing application of state jurisdiction to such land.[7/]

[6/] 25 C.F.R. § 1.4(b) provides in pertinent part that the Secretary or her authorized representative may, in specific cases, and in consultation with the affected Tribe:

> adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as (s)he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property.

[7/] Here federal defendants must respond to plaintiffs' inaccurate representation of their position respecting the Interior Department's lack of authority to unilaterally impose state requested use restrictions on land acquired in trust for tribes. Ps' Br. 23. Throughout this litigation plaintiffs have sought to have federal defendants unilaterally impose use restrictions and state jurisdiction on any trust acquisition of the Tribe's 31-acre parcel. AR Vol. II, Tab I; Vol. III Tab U, (Ex. 21).

Plaintiffs continue this theme by arguing that because of the jurisdictional provisions of the Settlement Act, the Secretary "can only take the Parcel into trust subject to the State's civil and criminal jurisdiction." Ps' Br. 7 n.9. What plaintiffs misperceive, or perceive and ignore, is that the Tribe's settlement lands were taken into trust subject to state jurisdiction because *Congress* had imposed that jurisdictional regime through enactment of the Settlement Act. The Secretary in contrast, has no statutory or regulatory authority to unilaterally impose state-desired jurisdictional restrictions on tribal trust land

Plaintiffs further assert that the Secretary's decision to approve the Tribe's trust application creates jurisdictional conflict because once taken into trust, the parcel would not be subject to primary State jurisdiction. Ps' Br. 26. Here plaintiffs make the unsubstantiated claim that the Secretary's decision "recommends that the State should have no jurisdiction over the Parcel." Ps' Br. 26. Neither the BIA Realty Officer's recommendation memorandum, AR Vol. II, Tab H, nor the final decision letter, AR Vol. II, Tab O, make any such "recommendation." Instead, the recommendation memorandum outlines the ways in which the Tribe and the Federal government would assume primary governmental responsibility for the land once in trust. AR Vol. II, Tab H, p. 3. As explained in Part IV A below, however, trust acquisition of Indian land does not effect a wholesale ouster of State jurisdiction. In any event, the fact that trust status would render the parcel subject to jurisdiction distinct from that running to the Tribe's Settlement Act lands is not remarkable. Plaintiffs' concern over what they term a "patchwork jurisdictional scheme," Ps' Br. 26, is simply a fact of coexisting federal, state and tribal land jurisdiction. As the Second Circuit observed in an analogous case concerning the Mashantucket Pequot Tribe, "the possibility of heterogeneous jurisdictional areas within the Mashantucket Pequot's lands does not compel a different result in this case." Connecticut ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82, 91 (2d Cir. 2000) (citing Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 502 (1979) ("In short, checkerboard jurisdiction is not novel in Indian law")).

B. The Secretary Fulfilled Her Responsibilities Under NEPA

Plaintiffs allege that the Secretary erred by not conducting an Environmental Assessment in addition to the EA submitted by the Tribe, and by not preparing an Environmental Impact Statement ("EIS"). Ps' Br. 26-27. The Bureau, however, fully complied with the National Environmental Policy Act ("NEPA") in its consideration of the Tribe's trust application. First, the Bureau was not required to prepare an EIS absent a triggering finding that the proposed action would significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EA submitted by the Tribe in conjunction with its trust application served as the starting point for the Bureau's assessment of the significance of the

environmental impacts associated with the Tribe's trust application as is contemplated by 40 C.F.R. § 1506.5(b).[8/] AR Vol. I, Tab L, p. 19. The Bureau did not, however, merely accept the findings and supporting representations made by the tribal applicant here. Ps' Br. 27.

Plaintiffs point to a handwritten note on the cover of the Tribe's initial EA as evidence that the Bureau did nothing more than accept the Tribe's representations: "[I]n reviewing the Tribe's EA, the BIA's NEPA Compliance Officer candidly observed that it was 'not much of an EA, but what the heck.'" Ps' Br. 27. Plaintiffs, however, provide only a partial rendition of the handwritten note. The complete note demonstrates an analysis of the materials submitted in the EA, as it requires that supplemental information be provided before the EA is approved. The remainder of the note reads: "Need more information on archeological sites (3) and measures to protect them. Need letter from US F&WL [Fish and Wildlife] Service on presence of Endangered Species or their critical habitat." AR Vol. I, Tab L; see also AR Vol. I, Tab S (letter informing the Tribe of these additional requirements). The Administrative Record also shows that the Bureau determined the Tribe's EA deficient for lack of "certification from the state that the proposed land use is in compliance with the State Coastal Zone Management Plan."[9/] AR Vol. II, Tab D (Ex. 10). The Bureau ensured that the requisite supplemental information was provided before completing its analysis and issuing a Finding of No Significant Impact ("FONSI").[10/] AR Vol. I, Tab U (species and habitat information); AR Vol. I, Tab V & W (archeological information);

[8/] The regularity of the Bureau's NEPA process here is confirmed by the BIA's NEPA Handbook: "When the proposed Bureau action is a response to an externally initiated proposal . . . , the applicant will normally be required to prepare the EA, if one is required, and to provide supporting information and analyses as appropriate." NEPA Handbook at 4.2 B. ("Externally Initiated Proposals").

The Handbook also encourages the Bureau to coordinate its NEPA process with tribal processes. "Such coordination helps achieve the policies and purposes of the CEQ regulations, reduces paperwork and delay, integrates environmental considerations into the early stages of planning and decisionmaking, and increases the usefulness of the NEPA process for decisionmakers." Id. at 2.6.

[9/] Contrary to plaintiffs' assertion that "[t]he BIA did not address the environmental consequences of the housing project by this Court in 1995," Plaintiffs' St. of Und. Facts ¶38, the Area Director requested that this certification be obtained in light of this Court's order the previous year that the Tribe satisfy the "applicable requirements of Rhode Island's Coastal Resources Management Program." Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. 349, 366 (D. R.I. 1995).

[10/] In June 1997, the Bureau also independently conducted a hazardous substances survey of the Tribe's 31-acre parcel. AR Vol. II, Tab A.

AR Vol. I, Tab Y & AR Vol. II, Tab D (Ex. 11) (coastal zone information);[11] AR Vol. II, Tab B (FONSI). With issuance of the FONSI, the Bureau satisfied its NEPA responsibilities. 40 C.F.R. § 1501.4(e). No EIS was undertaken because there was no finding of impacts sufficient to trigger one, and not, as plaintiffs gratuitously claim, because one was "unobtainable." Ps' Br. 27.

---

[11] Plaintiffs incorrectly argue that the Secretary failed to comply with NEPA by not independently seeking an environmental determination by the State's Coastal Resource Management Council ("CRMC") for a proposed fifty-unit housing development, which, they contend, is "five times the density" previously approved by the CRMC and in violation of a zoning ordinance that "sets the zoning density at two acres per lot." Ps' Br. 27-28; see also Plaintiffs' St. of Und. Facts ¶18, ¶29. First, there is no provision within NEPA that requires this separate determination; the Secretary conducted a proper and thorough NEPA review for the proposed trust acquisition. In any event, plaintiffs incorrectly characterize the size of the development and the applicable zoning rules.

Plaintiffs selectively quote the Tribe's 1997 trust application for the proposition that the development would consist of fifty units. Plaintiffs' Br. 41. Plaintiffs, however, fail to acknowledge the Tribe's further statement in the application:

> NIWHA and the Tribe, at that time [October 10, 1991], had planned to develop 50 units of low-income housing on this site. However, as a direct result of State and local opposition to the development, the costs associated with the project have substantially increased thereby significantly reducing the number of units that can be built under the existing contract with HUD.

AR Vol. II, Tab D pp. 5-6. In addition, the Town was notified by the Tribe in 1997 "that presently the Tribe's plans are for the construction of 30 units of affordable housing." AR Vol. IV, Tab B (Ex. 9). Since 1997, the Tribe has further reduced the number of units to twelve. Moreover, the density requirements cited by the plaintiffs were in reference to a residential subdivision in existence at the time the Tribe purchased the land. As explained by the Town Council in 1996: "The Tribe discontinued the subdivision scheme and reconsolidated the area as one lot of approximately 30 acres." AR Vol. I, Tab Y (Ex. 15, p. 5).

Notwithstanding these arguments, any claims plaintiffs make regarding CRMC and zoning non-compliance are now moot as the Tribe has since received its building and zoning approvals from both CRMC and the Town of Charlestown for its twelve-unit housing development in the reconsolidated area. The CRMC Assent Modification Approval states:

> Council, having fully considered said application in accordance with all the regulations as set forth in the Administrative Procedures Act does hereby authorize said applicant, subject to the provisions of Title 46, Chapter 23 of the General Laws of Rhode Island, 1956, as amended, and all laws which are or may be in force applicable thereto: assent modification to: construct and maintain a 12 unit single-family residence, cluster development, served by a community ISDS and by on-site wells . . . .

See Exhibit 2 to Federal Defendants' Opening Br. Similarly, the Town of Charlestown Zoning Board of Review decision states:

> At a meeting of the Zoning Board of Review held Tuesday, February 20, 2001, [the Tribe's] petition for a Special Use Permit under Article X, Section 218-27 to provide single family low-income housing on a site presently restricted to one (1) residential dwelling perm [sic] two (2) acres in an R2A Zone was granted unanimously . . . The Board felt that the applicant meets the guidelines as outlined and will not result in adverse impact or create conditions that will be inimical to health, safety, morals or general welfare of the community. The requested permit will not alter the general character of the area or impair the intent and purpose of the Zoning Ordinance or Comprehensive Plan, on which the ordinance is based.

See Exhibit 1 to Federal Defendants' Opening Br. Plaintiffs' assertion of NEPA non-compliance must be rejected as contrary to the law, the Administrative Record, and the on-the-ground facts.

Plaintiffs' further suggestion that the Bureau erred by not holding hearings or consulting with plaintiffs regarding the Tribe's proposed housing project is unsupported in either law or fact. Ps' Br. 28. Tellingly, plaintiffs cite no authority for the proposition that the Bureau was required to schedule a hearing with the Town.[12/] The Bureau did, however, follow the governing regulations which require that State and local governments be notified of the Bureau's receipt of a tribal request to have lands taken into trust and be informed of their opportunity to provide written comments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d), AR Vol. II, Tab E.[13/]

Finally, plaintiffs complain that the Bureau failed to account for Town drainage easements within the Tribe's 31-acre parcel. Ps' Br. 28 n.40. The Bureau fully responded to this complaint in its answering brief before the Interior Board of Indian Appeals ("IBIA"):

> Appellants object to the Area Director's decision because the deed proposed for use in the trust conveyance transaction does not reference a drainage easement on the property in favor of the Town of Charlestown. The Bureau is always amenable to working with interested parties to ensure that their interests are protected. It is a certainty in this case that had the Town indicated its concern to the Bureau, the deed would have been redrafted. There is still time to redraft the deed in the event this dispute is resolved in the Bureau's favor. Therefore, the Town of Charlestown is issued an open invitation to confer with the Bureau and the undersigned with regard to deed language.

AR Vol. IV, Tab A. Clearly, the Bureau is poised to accommodate the Town's concerns on this point which, like plaintiffs' other NEPA-based claims comes nowhere close to demonstrating arbitrary or capricious agency action.

C. NAHASDA Did Not Constrain the Secretary's Authority Here

Plaintiffs advance the completely unsubstantiated argument that the Secretary's authority to

---

12/ Federal defendants note, however, that the State's CRMC held a hearing on April 22, 1997, concerning the Tribe's trust acquisition proposal. Apparently, neither the State nor the Town interposed any objections to the acquisition at that hearing. AR Vol. IV, Tab B, p. 26.

13/ The fact that the Bureau apparently only sent this notice to the Town is harmless error in light of the fact that the State suffered no prejudice due to its receipt of the notice from the Town. The State exercised its opportunity to submit comments on the Tribe's application, and those comments were thoroughly considered by the Bureau. AR Vol. II, Tab I; AR Vol. III, Tab U (Ex. 21); AR Vol. II, Tab K; AR Vol. II, Tab L.

approve the Tribe's trust application was somehow constrained by the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), an Act administered not by the Department of the Interior, but by HUD. Plaintiffs' Br. 43. The provision of NAHASDA cited by plaintiffs, 25 U.S.C. § 4111(c), pertains to the authority of the Secretary of HUD to provide grants to tribes for affordable housing activities and has nothing to do with the Secretary of Interior's trust acquisition authority under section 5 of the IRA. There is simply no merit to plaintiffs' strained attempt to link NAHASDA to the Secretary's authority to take land into trust for tribes.

D. The State CRMC Has Approved the Subject Trust Acquisition

Plaintiffs incorrectly claim that the Bureau failed to follow the Federal Consistency Review procedures outlined by the Coastal Zone Management Act ("CZMA") and the Rhode Island Coastal Resources Management Program ("CRMP"). Ps' Br. 29-30. Plaintiffs claim that the BIA should have sought Federal Consistency Review as a result of the Tribe's proposed "50-unit housing development,"[14/] especially in light of the Tribe's "inconsistent acknowledgment that the HUD and CRMC regulations are incompatible." Id. However, the housing development was proposed, approved, and commenced by the Tribe, in conjunction with HUD (a separate agency), *prior to* the Tribe's application to the BIA to take the land into trust. Moreover, the BIA had been informed by the Tribe, the State's Coastal Resources Management Council ("CRMC"), and this Court's opinion in Narragansett Indian Tribe v. Narragansett Electric Co., 878 F. Supp. at 366, that the Tribe would be addressing the potential effects of the housing development with the CRMC and would not be allowed to proceed with its housing development until all CRMP requirements had been met.[15/] In other words, the Agency understood that any potential effects previously brought about by the housing plan were being addressed by the Tribe and the CRMC, and therefore, any BIA consultations with CRMC in this regard would be redundant.

[14/] Again, this is an inaccurate characterization as the Tribe's housing development has been reduced from the proposed fifty units to twelve units. See supra note 11.

[15/] The BIA notified the Tribe in 1996 of its awareness of the Tribe's responsibility and its "understanding that the tribe is currently working with the state to secure documentation of this compliance." AR Vol. II, Tab D (Ex. 10).

Apart from this resolved housing issue, the Bureau had no reason to believe that approving the trust application would affect any coastal use or resource, and thus was not required to file a consistency determination with CRMC. BIA's compliance with the CRMP is further bolstered by a 1997 letter from CRMC stating that the Tribe's "application for trust status is consistent with the RICRMP." AR Vol. II, Tab D (Ex. 11). In any event, all of the purposes of the CZMA and CRMP have been fulfilled, and no injury has been incurred by plaintiffs, as the Tribe has since received the necessary Assent from the CRMC for its housing activities. See Exhibit 2 to Federal Defendants' Opening Br.[16]; see also supra note 11; Knaust v. City of Kingston, New York, 1999 WL 31106, at *7 (N.D.N.Y. Jan. 15, 1999) (CZMA claim declared moot due to state approval of project, even though state approval was granted after Federal agency decision); Northwest Envtl. Def. Ctr. v. Brennen, 958 F.2d 930, 937 (9th Cir. 1992) (CZMA claim denied where purported procedural violations resulted in no injury to plaintiffs).

E. The Secretary Had No Obligation to Consider IGRA-Related Issues Here

Plaintiffs conclude their APA claims by arguing that the Secretary abused her discretion in failing to engage in an Indian Gaming Regulatory Act ("IGRA") analysis of the Tribe's trust application. Ps' Br. 30. As set forth in federal defendants' opening Memorandum in Support of Summary Judgment, (pp. 14-15), the Secretary is under no obligation to engage in a hypothetical analysis of uses not set forth in a tribal trust application. In effect, plaintiffs are using their long and tortured fight against the Tribe over its ability to invoke the provisions of IGRA on its settlement lands as a pretext for blocking the Tribe's ability to avail itself of the provisions of an entirely different statute -- the Indian Reorganization Act, for housing purposes. While Congress overrode the First Circuit's confirmation of the Tribe's right to invoke IGRA on its settlement lands, see Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994); 25 U.S.C. § 1708(b), there has been no similar feat with respect to the Tribe's rights under the

[16] The two Exhibits to Federal Defendants' Memorandum in Support of Summary Judgment are part of the record of this case as they were submitted with the Tribe's response to federal defendants' April, 2001 letter sent to the Tribe to comply with the Court's instruction to all counsel to explore settlement possibilities with their clients and with the Tribe. These documents were forwarded, together with the Tribe's responding letter, to counsel for the plaintiffs and to the Court.

IRA. The Narragansett Tribe, like other federally recognized tribes, is fully entitled to request that the Secretary accept land into trust on its behalf.[12/]

II. THE RHODE ISLAND INDIAN CLAIMS SETTLEMENT ACT DOES NOT EXPRESSLY OR IMPLICITLY REPEAL THE INDIAN REORGANIZATION ACT

The centerpiece of plaintiffs' challenge appears to be their unsubstantiated claim that the Rhode Island Indian Claims Settlement Act ("Settlement Act"), 25 U.S.C. § 1701-1716, a congressionally sanctioned settlement of the Tribe's aboriginal land claims, operates to bar the now federally recognized Narragansett Indian Tribe from invoking a law of general application to tribes -- section 5 of the Indian Reorganization Act. Plaintiffs' claim is wholly unavailing as nowhere in the text of the Settlement Act does Congress express an intent to repeal application of the Indian Reorganization Act to the Narragansett Tribe. This, notwithstanding that Congress clearly contemplated that the Narragansett might, in the future, achieve the federal acknowledgment that would entitle the Tribe to invoke the provisions of the IRA. See 25 U.S.C. 1707(c). Thus, plaintiffs' Settlement Act argument depends on an interpretation that Congress implicitly repealed the applicability of the IRA to the Narragansett Tribe. It is well settled, however, that repeals by implication are disfavored. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 703 (1st Cir. 1994). An implication from silence that Congress intended to divest a federally recognized tribe of one of the incidents of tribal status is particularly disfavored and should be avoided by this Court. See Iowa Mutual Insurance Co. v. La Plante, 480 U.S. 9, 18 (1987).

A. The Settlement Act Does Not Expressly Repeal Application of the IRA to the Tribe

For plaintiffs to demonstrate an express repeal by the Settlement Act would require an "affirmative showing of an intention to repeal" the applicability of section 5 of the IRA to the Tribe. See Morton v. Mancari, 417 U.S. 535, 550 (1974). There is no such intent expressed within the Settlement Act. Contrary to plaintiffs' strained reading, Congress did not prohibit land that was identified by the

[12/] Plaintiffs are simply wrong in their assertion that the determination to accept the Tribe's trust application for Indian housing purposes amounts to a "violation of IGRA" merely because the Tribe has characterized the parcel as contiguous to the Settlement Lands. Ps' Br. 30. Plaintiffs cite no IGRA provision for this proposition as indeed there is none.

Tribe as part of its aboriginal territory, but not ultimately selected as part of its 1800 acres of settlement lands, from ever being taken into trust for the Tribe. Ps' Br. 8. No matter how many times plaintiffs repeat their mantra that the Settlement Act expressly intended to resolve all Indian land claims within the State of Rhode Island for all time, Ps' Br. 3-5, 7, they cannot convert this case into an Indian land claim case. While plaintiffs are correct that the Settlement Act was intended to finally resolve the Indian Nonintercourse Act claims of the Naragansett and any other Indians in Rhode Island, the decision challenged here has nothing to do with aboriginal land claims. The Tribe has not reinvoked claims to land. Instead it simply has invoked its right as a federally recognized tribe to request that the Secretary accept into trust land that it purchased for tribal housing purposes.[18/] Notwithstanding plaintiffs' effort to conflate that request with "an Indian land claim," Ps' Br. 4, there are no aboriginal or other land claims at issue here, and thus there is no basis for applying res judicata principles as suggested by plaintiffs. Ps' Br. 7-8.

Like the State of Connecticut before them, plaintiffs attempt to argue that the discrete settlement of the Tribe's aboriginal land claims actually encompassed a much broader resolution of the Tribe's future ability to purchase land not ultimately designated as settlement lands, and to have that land taken into trust by the Secretary. Ps' Br. 4-8. The Second Circuit found in rejecting the nearly identical argument advanced by the State of Connecticut and three towns that

> [t]he Settlement Act was not, as the Connecticut plaintiffs argue, a comprehensive statute intended to settle once-and-for-all the extent of the Mashantucket Pequot's sovereignty. Rather, it emerged from the specific land dispute arising out of the 1976 lawsuits filed by the Tribe * * * Congress saw the Settlement Act as providing the necessary federal implementation of the private agreement negotiated between the parties that would end the existing lawsuit. Nothing in the Act indicates that Congress intended to establish the outermost boundaries of the Tribe's sovereign territory.

Connecticut ex rel. Blumenthal, 228 F.3d at 90.[19/] Like the Connecticut Settlement Act, the Rhode Island

---

[18/] The Tribe previously invoked the IRA in order to have its Settlement Act lands taken into trust, which procedure was upheld against the Town of Charlestown's challenge identical to the one advanced here. Town of Charlestown, Rhode Island v. E. Area Dir., BIA, 18 IBIA 67, 71 (1989).

[19/] Prior to the Second Circuit's decision overturning the district court, plaintiffs argued to the IBIA that the district court's decision "len[t] significant support to the position of the State of Rhode Island and the Town of Charlestown that the Rhode Island Indian Claims Settlement Act . . . prohibits the Secretary from taking land in trust without

Act did not settle once and for all the future contours of the Narragansett Tribe's sovereignty or potential land ownership.[20/] Instead, the Act settled the boundaries of the land component of the negotiated compensation for the Tribe's agreement to extinguish its Indian Nonintercourse Act claims to a much broader area of Rhode Island.

Plaintiffs also argue that section 1707(c) "expressly extinguished" the federal government's ability to acquire land in trust for the Tribe. Ps' Br. 6. First, plaintiffs mischaracterize what is essentially a release of United States' liability (the United States "shall have no further duties or liabilities") as a future restriction on the federal government's ability to act in a trustee capacity toward the Narragansett Tribe. Second, plaintiffs ignore the balance of section 1707(c) which clarifies that if the Secretary "subsequently acknowledges the existence of the Narragansett Tribe of Indians," the settlement lands become subject to a federal restriction on alienation -- a hallmark of both Indian Nonintercourse Act and Indian Reorganization Act protections for Indian land.[21/]

Tellingly, section 1707(c) says nothing about future acquired non-settlement lands, and to the

---

further authority of Congress," because "[*t*]*he Connecticut Settlement Act is substantially similar to the Rhode Island Settlement Act*." AR Vol. IV, Tab D (emphasis added). Now that the Second Circuit has held that the "substantially similar" Connecticut Act does not supplant the Secretary's authority to accept land into trust pursuant to the IRA, plaintiffs seek to disavow the similarity between the two acts. Ps' Br. 6-7, n.8. Plaintiffs' newly advanced and strained distinctions should be rejected on the basis of plaintiffs' own earlier logic.

[20/] While both the Connecticut Settlement Act and the Rhode Island Settlement Act were intended to effect once-and-for-all settlements of aboriginal land claims, neither sought to comprehensively limit the scope of the Tribes' privileges and immunities as federally recognized tribes. Nothing in the Rhode Island Settlement Act or its legislative history supports plaintiffs' claim that the Act was intended to repeal the applicability of the IRA to the Narragansett Tribe upon the Tribe's federal recognition.

[21/] Section 1707(c) of the Settlement Act provides in full that:

> Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

extent that it suggests anything about the Tribe in a future, federally recognized capacity, it suggests that the Tribe, like other tribes, would be entitled to protective federal privileges. In short, plaintiffs offer an illogical interpretation of section 1707(c), which interpretation improperly inverts the applicable principles of statutory construction.

Once the Narragansett Tribe was federally recognized, 48 Fed. Reg. 6177 (Feb. 2, 1983), it was entitled to the "immunities and privileges available to other federally acknowledged Indian tribes," 25 C.F.R. § 83.2, including the privilege of seeking to have its 31-acre parcel outside the settlement lands accepted into trust pursuant to the IRA. Like all federally recognized tribes, the Narragansett Tribe is presumed to retain all aspects of inherent sovereignty not clearly divested by an act of Congress. See United States v. Wheeler, 435 U.S. 313, 323 (1978).

B. The Settlement Act Does Not Implicitly Repeal Application of the IRA to the Tribe

"In 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." Morton, 417 U.S. at 550. In the context of a prior effort by the State to cabin the Tribe's entitlement to the benefits of federal statutory law, the First Circuit restated the "bedrock principle" that repeals by implication are disfavored. Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 703. "So long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective." Id. (citing Traynor v. Turnage, 485 U.S. 535, 547-48 (1988)). Only upon a showing of repugnancy of provisions without any repealing clause, or that the latter statute covers the entirety of the subject matter of the first and is intended as a substitute, may a repeal be implied. Id. (citing U.S. v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1871); Posadas v. National City Bank, 296 U.S. 497, 503-04 (1936); Natural Resources Defense Council v. EPA, 824 F.2d 1258, 1278 (1st Cir. 1987)).

Moreover, the Supreme Court has consistently cautioned against concluding, as plaintiffs do here, that in the face of silence, a congressional enactment divests privileges attendant to tribal status. See Iowa Mutual, 480 U.S. at 18; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper

respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"); see also Rhode Island v. Narragansett Indian Tribe, 19 F.3d at 703.

The Settlement Act and the IRA are entirely distinct. The Settlement Act reflects the Narragansett Tribe's agreement to extinguishment of its aboriginal title claims to 3200 acres of land within Rhode Island in exchange for the surety of fee title to 1800 acres and other compensation. 25 U.S.C. § 1705 (a)(3). One effect of the Settlement Act is to quiet title to the remaining acreage and to preclude the assertion of any aboriginal land claims by the Tribe. The Indian Reorganization Act, on the other hand, allows federally recognized tribes to request that the Secretary of Interior accept into trust tribally-owned fee lands that they purchase or otherwise acquire. 25 U.S.C. § 465. Such a request is *not a land claim*. Because resolution of aboriginal title claims is completely distinct from trust acquisitions under the IRA, it is entirely possible for land that was once the subject of an aboriginal title claim to later become the subject of a tribal trust acquisition request if the Tribe later acquires such land.

The Second Circuit found in the analogous context of Connecticut ex rel. Blumenthal, 228 F.3d at 88, that nothing in the Connecticut Settlement Act "supplants the Secretary's power under the IRA" to take lands (not acquired with settlement funds) into trust for the Tribe. As in Connecticut ex rel. Blumenthal, the Rhode Island Settlement Act and the IRA are readily "capable of coexistence" and should each be regarded as effective.[22/] See Morton v. Mancari, 417 U.S. 535, 551 (1974). Indeed, plaintiffs' principal citation to the text of the Act indicates a consonance with the protective purposes of the IRA rather than the phantom "prospective limitation" they advance. P's Br. 6. They argue that the Settlement Act contains a "prohibition against subsequent federal entanglement with the Tribe or the

[22/] Plaintiffs' argument that the Second Circuit construed "similar language," Ps' Br. 6, in the Connecticut Settlement Act as an absolute prohibition on the federal government taking certain land into trust, is misleading and must be rejected. The provision in the Connecticut Settlement Act that plaintiffs rely on prohibits the trust acquisition of lands purchased with Settlement Act funds that are located outside the settlement area. 25 U.S.C. § 1754 (b)(8). The Rhode Island Settlement Act contains no such provision and therefore plaintiffs' reliance on the Blumenthal court's construction of section 1754 (b)(8) is misplaced.

Settlement Lands,"[23] including a "prospective limitation" on the federal government's ability to acquire land in trust for the Tribe. Ps' Br. 6. In so arguing, plaintiffs urge a disfavored repeal by implication of the "incidences flowing from federal recognition," offend the Supreme Court's caution against construing a congressional enactment in a manner that divests the privileges attendant to tribal status, and contravene the special Indian canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Connecticut ex rel. Blumenthal, 228 F.3d at 92-93; State of Rhode Island, 19 F.3d at 691.

This Court should defer to the IBIA and the Secretary and reject plaintiffs' Settlement Act argument, a result fully consistent with the Second Circuit's disposition of the near parallel argument advanced by the State of Connecticut. See Connecticut ex rel. Blumenthal, 228 F.3d at 93 (recognizing deference due Interior Department's interpretation of Connecticut Settlement Act).

III. THE NARRAGANSETT TRIBE IS ENTITLED TO INVOKE THE IRA

Plaintiffs argue that the IRA, and more particularly section 5 of the IRA, does not apply to the Narragansett Indian Tribe because the definitions of "Indian" and "Indian tribe" contained in the Act limit its application to tribes recognized in 1934. As set forth in our opening brief (p. 16 n.8), the definitional language of the Act is not so limited. Even assuming *arguendo* that the language once had such a limiting effect, Congress has clarified that the provisions of the IRA are available to all federally recognized tribes irrespective of the date of their recognition. See, 25 U.S.C. § 2202. Congress has also specifically amended the IRA to prohibit federal agencies from making the distinction between tribes that plaintiffs propose. See, 25 U.S.C. § 476(f), (g).[24] Hence, plaintiffs citation to United States v. State Tax Comm'n, 505 F.2d 633, 642 (5th Cir. 1974), Ps' Br. 18, is unavailing as it predates these clarifying

[23] The language of the Act directly contravenes this proposition as it expressly contemplates future federal recognition of the Tribe which would necessarily "entangle" the Secretary with the Tribe, and goes on to actually require "federal entanglement" with the settlement lands upon federal recognition of the Tribe.

[24] Thus, plaintiffs' assertion that the Congress "limited the application of § 465 through the definition of the term 'Indian,' which has never been amended," Ps' Br. 19, is plainly misleading.

amendments to the IRA and the Indian Land Consolidation Act ("ILCA"). Plaintiffs' attempt to bolster their argument by reference to a 1937 letter by the Commissioner of Indian Affairs (sent in response to an unspecified request) concluding that the tribe could not have a claim against the federal government, is likewise unavailing. Ps' Br. 19. Plaintiffs ignore not only the purpose of the federal acknowledgment process, but the subsequent 55 years of history between the federal government and the Narragansett Tribe. The acknowledgment process established a procedure to ascertain, once and for all, a group's status vis-a-vis the United States. Federal acknowledgment means that a "Tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes." 25 C.F.R. § 83.2. The Narragansett Indian Tribe was formally acknowledged in 1983, 48 Fed. Reg. 6177 (Feb. 2, 1983). As the First Circuit has already opined:

> Federal recognition is just that: recognition of a previously existing status. The purpose of the procedure is to 'acknowledg[e] that certain American Indian tribes exist.' 25 C.F.R. § 83.2 (1993). The Tribe's retained sovereignty predates federal recognition - - indeed, it predates the birth of the Republic, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) - - and it may be altered only by an act of Congress, see Morton, 417 U.S. at 551-52.

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994). There is simply no merit to plaintiffs' claim that the IRA does not apply to the Narragansett Tribe.[25/]

IV. SECTION 5 OF THE IRA IS CONSTITUTIONAL

Plaintiffs argue that, absent a state's consent, the United States may never take land into trust for tribes without offending the Constitution's Enclave Clause or the Admissions Clause. Ps' Br. 8-17. On the one hand, Rhode Island asks this Court to equate Indian trust lands with the kind of federal enclaves

---

[25/] A similar claim was brought in City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D.D.C. 1980), in which a city challenged the Secretary's authority to take land into trust for the Chippewa Indians of Sault Ste. Marie. The City asserted that the Secretary's decision under the IRA was unlawful because the tribe was not recognized in 1934 and was not landless. The court dismissed the City's claims and held that if the "question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934." Id. at 161.

Here, it is clear that the Secretary, through the acknowledgment process, determined that the Narragansett Tribe is federally recognized and entitled to all the immunities and privileges available to other federally acknowledged tribes. 25 C.F.R. § 83.2. Congress has authorized the Secretary to accept lands into trust for Indian tribes, 25 U.S.C. § 465, and that authority extends to the Narragansett Tribe. Thus, plaintiffs' arguments to the contrary must be rejected.

provided for under the Enclave Clause of the Constitution. See U.S. Const. art. I, § 8, cl. 17. The State would have this Court conflate any exercise of federal jurisdiction over state lands with the assumption of exclusive federal jurisdiction which completely ousts all state jurisdiction and which requires, under the Enclave Clause, state consent. Id. On the other hand, Rhode Island contends that the Indian tribes inhabiting areas that the Sate claims to be under exclusive federal authority are somehow possessed of sovereignty comparable to that of other states of the Union. According to Rhode Island, allowing a self-governing Tribe to exist within the confines of the territory of any of the fifty states offends the Constitution's requirement that states to be admitted to the Union not be "formed or erected within the Jurisdiction of any other State." U.S. Const. art. IV, § 3. Both of these claims are meritless.

A. The IRA Does Not Offend the Enclave Clause

The State contends that by taking the subject land into trust for the Tribe, the United States would create a federal enclave "exclu[sive of] state law, leaving Congress with the role of 'exclusively legislating' over the Parcel." Ps' Br. 15. The creation of a federal enclave in state territory subject to the exclusive jurisdiction of the United States requires, under the Constitution's Enclave Clause, the consent of the state. U.S. Const. art. I, § 8, cl. 17.

The United States assumes "exclusive legislative authority" over land acquired pursuant to the Enclave Clause "so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory." Silas Mason Co. v. Tax Comm'n of Wash., 302 U.S. 186, 197 (1937). The preclusion of state authority over land acquired for "needful Buildings," U.S. Const. art. I, § 8, cl. 17, was felt necessary by the drafters of the Constitution in order to ensure that the 'places on which the security of the entire Union may depend' would not 'be in any degree dependent on a particular member of it.' Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 530 (1885) (quoting Justice Story, 2 Constitution § 1219). However, a state must consent to the complete relinquishment of its legislative authority over land acquired under the Enclave Clause.

State consent of the sort required under the Enclave Clause is not a prerequisite to the United States' holding state land in trust for Indian tribes because such trust lands are not subject to the exclusive jurisdiction of the United States and are not acquired under the auspices of the Enclave Clause. It goes without saying that the United States may acquire state land without seeking to oust state jurisdiction over the land. The Supreme Court noted that, in general, where the United States owns state land "for public purposes[, s]uch ownership and use without more do not withdraw the lands from the jurisdiction of the State." Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930). Indeed, the Court has specifically identified trust lands as an example of land held for public purposes by the United States that does not constitute a federal enclave within the terms of the Enclave Clause:

> A typical illustration is found in the usual Indian reservation set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save they can have only restricted application to Indian wards.

Surplus Trading, 281 U.S. at 647.[26/]

The Court has recently confirmed the fact that lands held in trust are not subject to the exclusive jurisdiction of the United States, noting that "State sovereignty does not end at a reservation's border," and the existence of "States' inherent jurisdiction on reservations." Nevada v. Hicks, 121 S. Ct. 2304, 2311, 2313 (2001). Indian land, far from being the exclusive domain of the federal government, is the site

where multiple entities exercise jurisdiction, requiring "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." Id. at 2311; see also Silas Mason, 302 U.S. at 210 (noting that the United States does not exercise

---

[26/] The Court offers a rather simplified account of how federal, Indian, and state sovereignty intermesh on Indian trust lands. Cf. Atkinson Trading Co., Inc. v. Shirley, 121 S. Ct. 1825 (2001); Montana v. United States, 450 U.S. 544 (1981). The Court, in Surplus Trading, is not intent on sorting through the intricacies of how various sovereign powers accommodate each other within the confines of an Indian reservation. Rather, the Court summarily describes the character of Indian reservation land in the context of a discussion of the Enclave Clause to show an example of state land that is owned by the United States without the assumption of exclusive jurisdiction by the federal government or the requirement of consent by the state.

"exclusive legislative authority" over lands held in trust for Indians). Where state interests are minimal, as with "on-reservation conduct involving only Indians . . . state law is generally inapplicable," but where "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." Hicks, 121 S. Ct. at 2311. While the state has no regulatory authority over land subject to exclusive federal jurisdiction without congressional allowance, see Paul v. United States, 371 U.S. 245, 263 (1963) ("The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action."), state regulation over Indian trust lands is only impeded to the extent it conflicts with federal legislation designed to promote the welfare of Indians. See United States v. McGowan, 302 U.S. 535, 539 (1938) ("The Federal Government does not assert exclusive jurisdiction within the [reservation]. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the [reservation], of such state laws as conflict with the federal enactments.").

In short, Indian trust lands are easily distinguishable from the military bases and government installations typically sited on land acquired within the terms of the Enclave Clause.[22/] The State resorts

---

[22/] Nevertheless, to muster support for its argument to the contrary, the State cites to an unfortunate turn of phrase in a footnote to an Eighth Circuit case, United States v. Goodface, 835 F.2d 1233, 1237-38 (8th Cir. 1987), glossing a portion of 18 U.S.C. § 1153. Ps' Br. 15. Section 1153 "subjects an Indian committing assault [in Indian country] with a dangerous weapon to 'the same law and penalties as all other persons' committing the same offense 'within the exclusive jurisdiction of the United States.'" Goodface, 835 F.2d at 1237 (quoting 18 U.S.C. § 1153). Logically speaking, if Indian country were subject to the exclusive jurisdiction of the United States, there would be no need for a statutory provision making laws applicable in areas subject to exclusive federal jurisdiction also applicable to Indian country. In any event, the footnote the State relies on in Goodface cites to United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980), *abrogated on other grounds by* Schmuck v. United States, 489 U.S. 705 (1989), and that case makes explicit that section 1153 does not pre-empt state jurisdiction over crimes not involving Indians since where only non-Indians are involved, "federal courts lack[] jurisdiction over such crimes, and state courts possess[] the exclusive jurisdiction to try and punish such offenders." Johnson, 637 F.2d at 1231 n. 11.

Moreover, plaintiffs' citation to United States v. John, 437 U.S. 634 (1978), is both unavailing and misleading. Ps' Br. 15 n. 19. Not only is the quote they offer in their supporting parenthetical not to be found in the case, but the page cited makes explicit that section 1153 "ordinarily is preemptive of state jurisdiction," Id. at 634, a far different matter than total exclusion of state jurisdiction.

Finally, plaintiffs quote a law review article that misleadingly suggests a federal intention to establish Indian reservations as enclaves under exclusive federal jurisdiction once it became impossible to displace Indians westward outside of state territory. Ps' Br. 13 (quoting Joseph D. Matal, A Revisionist History of Indian Country, 14 Alaska L. Rev. 283, 295 (1997)). While new states often consented, as a condition of admission into the Union, to "the retention of 'absolute' federal jurisdiction over Indian lands," the Supreme Court has noted that "'absolute' federal

to Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908 (1st Cir. 1996), to argue that state civil and criminal jurisdiction is excluded from Indian Country (which includes Indian trust lands) as defined by 18 U.S.C. § 1151.[28/] Ps' Br. 14-15. But in that case, the First Circuit states clearly that "it is no longer true that state law plays no role within a tribe's territory," and proceeds to explain that "a pre-emption analysis is followed to determine if state law is pre-empted by federal and tribal interests as reflected in federal law." Narragansett, 89 F.3d at 914. In other words, the case reiterates the Supreme Court's jurisprudence concerning Indian trust lands. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (noting that applicability of state law to tribal members "turns on whether state authority is pre-empted by the operation of federal law"). Far from supporting the proposition that state civil and criminal jurisdiction are excluded from Indian Country, as defined by 18 U.S.C. § 1151, Narragansett merely recognizes that while section 1151 "on its face is concerned with [federal] criminal jurisdiction" in Indian Country, it also has been used to define the territory subject to federal civil laws concerning Indians. 89 F.3d at 915. At most, as discussed above, Indian country curtails application of state jurisdiction where "'it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" Cabazon Band, 480 U.S. at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462

---

jurisdiction is not invariably exclusive jurisdiction," especially given that "[t]he disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest." Organized Village of Kake v. Egan, 369 U.S. 60, 67-69 (1962). The purpose of such a disclaimer was not to establish a federal enclave under the Enclave Clause but to "ensur[e] that statehood would neither extinguish nor establish claims by Indians against the United States." Id. at 69. Because federal jurisdiction over Indian country in the western states is not premised upon the creation of enclaves of exclusive federal jurisdiction, the fact that Rhode Island was one of the original colonies and did not consent to absolute federal jurisdiction over Indian lands has no significance. See Coyle v. Smith, 221 U.S. 559, 574 (1910) (holding that legislative enactments posting conditions upon the admission of new states into the Union "derive . . . force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress").

[28/] 18 U.S.C. § 1151, which defines "Indian country," has the effect of determining the territorial scope of certain federal criminal laws applying to Indians. See 18 U.S.C. § 1151 et. seq. However, the section has been relied upon by courts to define the applicable territorial scope of both civil and criminal federal laws applying to Indians. See Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527 (1998) (noting that section 1151's definition of Indian country "also generally applies to questions of civil jurisdiction"). Indian trust lands have been held to be Indian country. See Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505, 511 (1991).

U.S. 324, 334 (1983)).

It therefore is settled, by both the Supreme Court and the First Circuit, that accepting land into trust does not create an exclusive federal enclave. The fact that federal legislation may pre-empt conflicting state legislation in some contexts on trust lands does not change that analysis. The Supreme Court has, in the context of Enclave Clause challenges to the exercise of federal legislative authority over federally owned lands, noted the distinction between derivative and non-derivative legislative powers. See Kleppe v. New Mexico, 426 U.S. 529, 541-42 (1976). "Congress may acquire derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, of the Constitution by consensual acquisition of land . . . But . . . the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause" *or other clauses of the Constitution.* Id. at 542-43. Thus, in Kleppe, the Court found "completely beside the point" New Mexico's objection that it had not consented, pursuant to the Enclave Clause, to federal legislation prohibiting the State from seizing wild animals on federally owned public lands in the State. Id. at 543. Where Congressional authority to legislate finds other Constitutional sources, the Enclave Clause is simply irrelevant. See id. ("Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause."); see also Nevada v. Watkins, 914 F.2d 1545, 1554 (9th Cir. 1990)("The State's consent or cession [under Enclave Clause] is not required when Congress acts pursuant to its plenary authority to regulate the public lands.").

Congressional authority to legislate matters affecting Indians living on land held in trust for Indians by the government has a non-derivative source and thus is not based on the state's consent under the Enclave Clause. The Supreme Court has recognized the "plenary power of Congress to deal with the special problems of Indians . . . drawn both explicitly and implicitly from the Constitution itself." Morton v. Mancari, 417 U.S. 535, 551-52 (1974). Explicitly, "Article I, § 8, cl. 3 provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." Id. at 552 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in

original). See also Venetie, 522 U.S. at 531 n. 6 (citing the Indian Commerce Clause as the source of "Congress[']s plenary power over Indian affairs").[22/] Implicitly there is "a plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." Morton, 417 U.S. at 535. See also Felix S. Cohen, Handbook of Federal Indian Law 211 (2d ed. 1982) (noting that courts "most often refer to the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause in discussing the source of federal power over Indian affairs," although "it is somewhat artificial to analyze the constitutional provisions separately").

Because the Constitution authorizes Congress to legislate Indian affairs without regard to the Enclave Clause, federal laws relating to Indians do not have a derivative legislative source, see Kleppe, 426 U.S. at 542, and therefore the consent of the state where the law is to have effect is not a prerequisite to such legislation. As the Supreme Court has stated, "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands . . ." Kleppe, 426 U.S. at 543. Accordingly, the requirements of the Enclave Clause simply have no relevance to decisions by the Interior Department to accept land into trust for Indian tribes.

B. The IRA Does Not Offend the Admissions Clause

Rhode Island asks this Court to conclude that self-governing Indian tribes cannot reside on state territory without offending the Admissions Clause of the Constitution. U.S. Const. art IV, § 3, cl. 1. The State relies on a provision of the Constitution that was meant to "quiet the jealousy" of states by assuring them that they would neither be partitioned nor combined in order to create new states to be admitted to the Union. The Federalist No. 43 (James Madison). The State contends, based on Supreme Court

[22/] The State invokes Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), to argue that "Congress does not have the authority under its Indian Commerce Clause power to encroach upon a state's sovereignty," Ps' Br. 17, although this inapposite case held only that the "Eleventh Amendment prohibits Congress from making [states] capable of being sued in federal court." Seminole Tribe, 517 U.S. at 76. Only by consistently misrepresenting the "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State on the other" which occurs in Indian country, see Hicks, 121 S.Ct. at 2311, can the State argue it is suffering an unconstitutional deprivation of its sovereignty over the trust land at issue here, Ps' Br. 17, and vaguely invoke federalist principles in its defense.

language describing the general characteristics of a state, that this Court should conclude that Indian tribes living on state land held in trust by the federal government are actually the equivalent of new states formed at the expense of existing states in violation of the Constitution. Ps' Br. 12, 16-17.

However, the Supreme Court has offered a gloss on what is meant by the term "State" in this clause of the Constitution: "The power [in art. IV, § 3] is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." Coyle v. Smith, 221 U.S. 559, 567 (1911) (emphasis in original). Further, the Court explained, the power to admit new states "is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is . . . a 'power to admit States.'" Id. at 566. Thus, contrary to plaintiffs' view, the term 'state,' as used in art. IV, § 3 of the Constitution contemplates more than a group of people possessing both a government and territory. Ps' Br. 12. Further, it cannot seriously be argued that self-governing tribes are political organizations possessing the same powers as states of the Union. The land possessed by a tribe is considered part of the state in which it exists, and tribal jurisdiction over the land is generally limited to the conduct of its own members–although, where important state interests are involved, "States may regulate the activities even of tribe members on tribal land." Nevada v. Hicks, 121 S. Ct. 2304, 2309-12 (2001). The Court has stated bluntly, "Tribal reservations are not States . . ." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). Accordingly, the presence of self-governing tribes on state territory does not offend the Admissions Clause of the Constitution.

For the same reason, plaintiffs' contention that the creation of trust lands violates the Constitution is meritless. In a case similar to the instant case, the Tenth Circuit rejected a claim that the creation of a school land trust by Congress in Colorado constituted an invasion of state sovereignty. See Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 636 (10th Cir. 1998). As here, the court was confronted with a party that "could provide no authority to support [its claim], other than to point to

cases interpreting the Tenth Amendment," which the court found "inapposite" given that another clause of the Constitution provided clear authority for the creation of the trust. Id. (holding creation of the trust permissible under the Constitution's Property Clause). As discussed above, the Supreme Court has recognized that Congress has plenary power under the Constitution to legislate matters affecting Indians, a fact that is not changed by the plaintiffs' recitation of the general principles of federalism.

C. The IRA Does Not Offend the Non-delegation Doctrine

As set forth in federal defendant's opening brief, (pp. 21-28), section 5 of the IRA is a constitutional conferral of congressional authority. As anticipated, plaintiffs rely on State of South Dakota v. United States Dept. of Interior, 69 F.3d 878 (8th Cir. 1995), a vacated decision, Dep't of Interior v. South Dakota, 519 U.S. 919 (1996), to argue that section 5 of the IRA violates the non-delegation doctrine.[40/] Ps' Br. 21-22. In so doing, plaintiffs ignore the many decisions issued since South Dakota which have rejected the very non-delegation doctrine challenges plaintiffs advance. See United States v. Roberts, 185 F.3d 1125, 1136-38 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000), City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 473 (D. D.C. 1978); City of Lincoln City v. United States Dep't of Interior, No. 99-330-AS, 2001 U.S. Dist. LEXIS 9865, at *23 (D. Or. April 17, 2001); Shivwits Band of Paiute Indians v. Utah, No. 2:95C-1025C, 2002 U.S. Dist. LEXIS 1956 at *8 (D. Utah, Feb. 6, 2002). Thus, as explained in detail in our opening brief, plaintiffs' assertion that courts have unanimously determined that section 5 of the IRA lacks an intelligible principle to guide the Secretary's decisionmaking misrepresents the case law and must be rejected.

CONCLUSION

For the foregoing reasons, federal defendants respectfully request that plaintiffs' Motion for Summary Judgment be denied and federal defendants' Motion for Summary Judgment be granted.

[40/] Plaintiffs also rely on State of Florida, Dept. of Bus. Reg. v. United States Dep't of Interior, 768 F.2d. 1248, 1256 (11th Cir. 1985). That case, however, involved review of a trust acquisition made when the federal position was that such acquisitions were committed to agency discretion. Thus, plaintiffs reliance on the court's analysis of section 5 of the IRA against the criteria for determining whether a matter is committed to agency discretion, Ps' Br. 21, is unavailing. The Eleventh Circuit did not have before it the question whether section 5 presented a non-delegation problem and made no finding in this regard.

Respectfully submitted,
March 7, 2002

MARGARET E. CURRAN
United States Attorney

ANTHONY C. DIGIOIA #2495
Assistant U.S. Attorney
Fleet Center
50 Kennedy Plaza, 8th Floor
Providence, RI 02903
Telephone: (401) 528-5477

JUDITH RABINOWITZ
Indian Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Telephone: (415) 744-6486
Fax: (415) 744-6476