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.	)	

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Pursuant to Fed. R. Civ. P. 56, federal defendants file this memorandum in support of their Motion for Summary Judgment. This memorandum demonstrates that there are no material facts in dispute and that defendants are entitled to judgment as a matter of law. At issue here is the Narragansett Indian Tribe of Rhode Island's ("Tribe") application to have a 31-acre parcel accepted into trust for low-income and elderly housing. Such status would secure the benefits and protections of federal superintendence for the Tribe's housing project, which the Department of Housing and Urban Development ("HUD") has determined is "badly needed to remedy the shortage of low-income family and elderly housing units for tribal members." AR Vol. I, Tab B. After careful review of the Tribe's application, including consideration of the criteria enumerated by the governing statute and regulations, the Secretary of Interior ("Secretary") properly approved the Tribe's application.

The plaintiffs' complaint, however, raises a litany of legal arguments to block the trust acquisition of the Tribe's housing development. Plaintiffs' claims are neither grounded in fact nor supported by law. Federal defendants therefore respectfully request that this Court find that the Secretary acted within the proper scope of her authority, that the challenged act is constitutional, and that federal defendants are entitled to judgment as a matter of law.

PLEADINGS

The principal pleadings in this action are the plaintiffs' complaint and the federal defendants' answer. Plaintiffs' complaint alleges both statutory and constitutional infirmities with the Secretary's[1] decision to accept the Tribe's application for trust acquisition of the Tribe's 31-acre parcel of fee land. Federal defendants' answer denies that plaintiffs are entitled to any of their requested relief. Answer ¶¶ 42, 46, 51, 54, 57, 60, 64, 72, 78, 82.

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[1] Throughout this brief "Secretary" will be used to denote the federal defendants even though the challenged decision was made by the Eastern Area Director, Bureau of Indian Affairs pursuant to authority delegated by the Secretary.

DESCRIPTION OF MOTION

Federal defendants seek summary judgment in their favor and against the State of Rhode Island, the Governor of Rhode Island and the Town of Charlestown with respect to their jointly filed complaint alleging statutory and constitutional defects with the Secretary's determination to approve the Narragansett Indian Tribe's application for trust acquisition of a 31-acre housing parcel. Federal defendants seek an order denying plaintiffs' motion for summary judgment and upholding the Secretary's trust acquisition determination under the review standards set forth in the Administrative Procedure Act ("APA").

STATEMENT OF FACTS

There are no material facts in dispute that would preclude granting summary judgment in the federal defendants' favor. What is in dispute is the legal significance of the facts alleged. Federal defendants incorporate by reference their Statement of Undisputed Facts.

ISSUES

Plaintiffs' complaint raises issues that fall into three categories:

A. Whether the Secretary's Decision Complied with Applicable Law and Should Be Sustained Under the APA

1. Whether, in approving the Tribe's trust application, the Secretary complied with the governing regulations found at 25 C.F.R. Part 151, such that the decision may be upheld under APA section 706(2).

2. Whether, in approving the Tribe's trust application, the Secretary complied with the Coastal Zone Management Act ("CZMA").

3. Whether, in approving the Tribe's trust application, the Secretary complied with the National Environmental Policy Act ("NEPA").

4. Whether the Native American Housing Assistance and Self-Determination Act ("NAHASA") has any relevance to the Secretary's trust acquisition decision.

5. Whether the Indian Gaming Regulatory Act ("IGRA") has any relevance to the Secretary's trust acquisition decision.

B. Whether the Indian Reorganization Act Applies to the Narragansett Indian Tribe

6. Whether the Secretary was correct in treating the Narragansett Indian Tribe as entitled to the benefit of section 5 of the Indian Reorganization Act of 1934 ("IRA").

7. Whether the Rhode Island Indian Claims Settlement Act ("Settlement Act") imposes any barrier to the Secretary's decision to approve the Tribe's trust application.

C. **Whether the Indian Reorganization Act Is Constitutional**

8. Whether section 5 of the IRA is a proper constitutional conferral of authority to the Secretary.

9. Whether there is any Tenth Amendment, Eleventh Amendment, or Enclave Clause barrier to the Secretary's acquisition of land into trust for tribes.

POINTS AND AUTHORITIES

A. **Summary Judgment Standard** -- Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49, 53 (1st Cir. 1996). Summary judgment is the appropriate mechanism for deciding cases brought before the Court under the APA. See, e.g., Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1472 (9th Cir. 1994) ("This case involves review of a final agency determination under the Administrative Procedures Act, 5 U.S.C. § 706; therefore resolution of this matter does not require fact finding on behalf of this court.").

B. **Review of Agency Action Under the APA** -- Plaintiffs seek judicial review of the Secretary's decision finally rendered after a full agency adjudicatory proceeding before the Interior Board of Indian Appeals ("IBIA"). The IBIA is the final arbiter of contested administrative actions by the Bureau of Indian Affairs ("BIA" or "Bureau").[2] Accordingly, this appeal is governed by the APA and the scope of review set forth in section 706 of that Act.

Section 706(2)(A) of the APA provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the

[2] The IBIA is the final authority within the Department of the Interior on appeals from administrative actions by BIA officials. See 43 C.F.R. §§ 4.1(b)(2)(i), 4.314.

law." This standard encompasses a presumption in favor of the validity of agency action. Thus, "[t]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1445-46 (1st Cir. 1992); Massachusetts v. Andrus, 594 F.2d 872, 888 (1st Cir. 1979). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989). "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706; see also Camp v. Pitts, 411 U.S. 138, 142 (1973); Overton Park, 401 U.S. at 420; Cronin v. United States Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990).

Under the APA and relevant case law, both the Area Director's decision to approve the Tribe's trust application, and the IBIA's opinion upholding that decision, are entitled to the deference normally accorded agencies. Lyng v. Payne, 476 U.S. 926, 939 (1986) (agency's construction of its own regulations is entitled to substantial deference); EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64, 83 (1980); Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1992) ("This standard of review is highly deferential; the court must presume the agency action to be valid.") (citing Overton Park, 401 U.S. at 415). However, "if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). These limitations on judicial review of agency decisionmaking are grounded in the separation of powers doctrine and the recognition that Congress has conferred certain discretionary decisionmaking powers to federal agencies equipped with special expertise. Cronin, 919 F.2d at 444.

The APA also provides the standard of review for plaintiffs' statutory claims. Cousins v. Sec'y of the United States Dep't of Transp., 880 F.2d 603, 605 (1st Cir. 1989) (explaining that APA was

intended to provide single uniform method for review of agency action). The APA is the sole mechanism for challenging federal agency action unless a party challenges agency action as violating a federal law that has been interpreted to confer a private right of action or where a regulatory scheme contains a specific provision for obtaining judicial review. Clouser v. Espy, 42 F.3d 1522, 1528 n. 5 (9th Cir. 1994); Hoefler v. Babbitt, 139 F.3d 726, 728-29 (9th Cir. 1998).

Plaintiffs' constitutional claims are reviewed de novo. This review, however, is set against the backdrop of case law consistently upholding preferential Indian legislation in the face of constitutional attack. Judicial consideration of Indian legislation is guided by the principle that such legislation is predicated upon the federal government's political and constitutionally recognized special relationship with Indian tribes. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974).

C. **Summary of Argument** -- Plaintiffs challenge the decision of the Secretary, as upheld by the IBIA, to approve the Narragansett Indian Tribe's application for trust acquisition of 31 acres of land for tribal housing. This memorandum addresses plaintiffs' APA and statutory claims prior to their constitutional arguments in order to assist the Court in its obligation to consider non-constitutional claims prior to reaching constitutional issues. Under the review standards supplied by the APA, plaintiffs cannot carry their burden to demonstrate that the Secretary's decision was arbitrary, capricious or contrary to law. Nor can plaintiffs overcome the presumption of constitutionality accorded federal statutes to establish that the Secretary's congressionally conferred trust acquisition authority found in section 5 of the IRA is either standardless or in excess of Congress' plenary authority to legislate for the benefit of Indians. Thus, plaintiffs' claims must be rejected and federal defendants are entitled to judgment as a matter of law on all counts set forth in the complaint.

ARGUMENT

I. THE SECRETARY'S DECISION FULLY COMPLIED WITH THE APPLICABLE LAW AND SHOULD BE UPHELD UNDER THE APA

A. The Administrative Record Demonstrates that the Relevant Regulatory Factors Were Appropriately Considered

Plaintiffs' first count alleges that the Secretary's decision to approve the Tribe's trust application violated the APA through failure of adequate evaluation under the governing regulations at 25 C.F.R. Part 151, and failure of the administrative record to support the decision. Complaint ¶¶ 41, 42. As the IBIA previously concluded in sustaining the Eastern Area Director's decision, the Area Director properly considered all legal prerequisites in exercising his discretionary decisionmaking authority. Town of Charlestown v. E. Area Dir., BIA, 35 IBIA 93, 96 (2000).

Section 5 of the IRA and the regulations found at 25 C.F.R. Part 151 guide the Secretary's decisionmaking on tribal applications to have fee land accepted into trust by the United States. These regulations distinguish between on-reservation acquisitions, § 151.10, and off-reservation acquisitions, § 151.11. The Narragansett Tribe's application for an off-reservation acquisition required consideration of two of the section 151.11 factors and seven of the section 151.10 factors, §§ 151.10(a)-(c), (e)-(h), that are incorporated by section 151.11. The record shows that the Area Director considered all of the relevant regulatory factors and made a reasoned decision based on the record before him.

1. Land Acquisition Policy. Section 151.3 of 25 C.F.R. sets out the Bureau's general land acquisition policy and states that land may be acquired in trust for a tribe under one or more of three circumstances:

> 1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidations area; or
> 2) When the tribe already owns an interest in the land; or
> 3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a) (1-3). The Tribe's application not only met one of these elements, it met all three. The recommendation memorandum upon which the Area Director's decision was based starts by noting that the Tribe's acquisition proposal falls squarely within all of the Bureau's overarching policy criteria. AR Vol. II, Tab H, p. 1.

2. Statutory Authority. Section 151.10(a) requires consideration of the statutory authority for

the proposed trust acquisition. The Bureau's recommendation memorandum correctly identifies section 5 of the IRA as supplying the requisite authority for the acquisition decision. AR Vol. II., Tab H, p. 1.

3. **Need for Additional Land.** The next factor requires the Bureau to consider the tribe's need for additional land. 25 C.F.R. § 151.10(b). In its analysis of this factor the Bureau noted that the Tribe's Housing Authority purchased the parcel for the express purpose of siting housing on it and because the parcel was better suited to this purpose than the Tribe's existing trust lands. Much of the Tribe's existing trust lands are either located over a primary aquifer, are wetlands, or are listed on or eligible for the National Register of Historic Places. AR Vol. II, Tab H, p. 2. In its review of the Area Director's decision, the IBIA also noted the substantial commitment of the Tribe's existing trust lands to conservation purposes. 35 IBIA at 95 & n.2. The subject parcel, in contrast, was previously approved for housing construction by State agencies as well as the State's Coastal Resources Management Council and was found to contain no fresh water wetlands. Id. at 95.

4. **Purposes for the Land.** Section 151.10(c) requires consideration of the proposed purposes for which the land will be used. The Bureau's evaluation of the Tribe's application considered the Tribe's need for affordable housing which currently is not available to all tribal members. The Bureau also noted the HUD support for trust acquisition of the parcel for "badly needed low-income family and elderly housing units for tribal members." AR Vol. I, Tab B. The IBIA's consideration of this factor noted that the Tribe's application set forth the criteria by which HUD funds the development of low-income housing for tribal members including the need to remedy a shortage of safe and sanitary housing for families of low income. 35 IBIA at 95. Thus, HUD's funding of the Tribe's housing project substantiates both the need and the purposes for the subject land.

5. **Impact of Removal from Tax Rolls.** Under 25 C.F.R. § 151.10(e), if the land to be acquired is in fee status, the Bureau is to consider the impact on the State and its political subdivisions from removal of the land from the tax rolls. Here the Bureau determined that removal of the relatively undeveloped parcel would not have significant impact on the tax rolls. It noted that for almost a year and

a half the Town of Charlestown did not even attempt to collect real estate taxes on the land. AR Vol. II, Tab H, p. 3.

6. Jurisdictional Issues. Section 151.10(f) requires consideration of jurisdictional and land use conflicts which may arise. In applying this factor to the Tribe's trust application, the Bureau noted that the Tribe and the State engaged in litigation over the meaning and scope of the jurisdictional provisions of the Settlement Act, but that those provisions are confined to the settlement lands and, therefore, are not relevant in this context. AR Vol II, Tab H, p. 3. In contrast, the Bureau noted that, if taken into trust, the 31-acre housing parcel would be subject to primary tribal and federal jurisdiction leaving the Tribe, the BIA and the Indian Health Service ("IHS") responsible for the provision of essential services on the land. Id. In this connection, the Bureau observed that the Town of Charlestown does not provide services for the parcel. Id. In addition to the evaluation contained in the staff-level recommendation memorandum, the Bureau referred certain jurisdictional matters raised by Governor Almond to the Regional Solicitor's Office for legal analysis. The Solicitor concluded that the Bureau could not subject the parcel to state criminal and civil jurisdiction as only Congress has that authority. AR Vol. II, Tab K. The Regional Solicitor's analysis in turn informed the Area Director's decision.

7. BIA's Ability to Discharge Duties. Section 151.10(g) requires that if the land to be acquired in trust is currently in fee status, the Bureau must consider whether it is equipped to discharge additional responsibilities in connection with the land. The Bureau analyzed this factor by noting that, pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450f, et seq., the Narragansett Tribe currently contracts with the BIA and IHS to provide federal service programs. Hence, the Bureau determined that acquisition of the housing parcel in trust would have minimal impact on the Bureau's ability to fulfill its responsibilities since the Tribe already provides basic federal services to its members. AR Vol. II, Tab K, p. 4.

8. Environmental Evaluation. The Bureau's environmental analysis was conducted by separately evaluating the Tribe's Environmental Assessment ("EA"). As part of this assessment, the

Bureau required that the Tribe include additional environmental information in the EA. In addition, the Bureau required the Tribe to secure confirmation from the State's Coastal Resources Management Council ("RICRMC") that the proposed fee to trust transfer was in compliance with the CZMA. AR Vol. I, Tab S, Vol. II, Tab C (Ex 10). The record contains the Finding of No Significant Impact ("FONSI") which completed the BIA's NEPA compliance. AR Vol. II, Tab B.

9. Location of Land Relative to State Boundaries. Under the Part 151 provisions specifically addressed to "off-reservation" acquisitions, the Bureau, upon receipt of a tribal application to have lands taken into trust, must notify the state and local governments with regulatory jurisdiction over the land of the Tribe's application. This notice must also inform the state and locality that they have thirty days within which to provide written comments on the acquisition's "potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d). By letter of July 24, 1997, the Area Director notified the Town of Charlestown of the Tribe's renewed application and invited comments to be supplied within thirty days. AR Vol. II, Tab E. The Town in turn forwarded the notification letter to the State. AR Vol. II, Tab I. The Town and the Governor submitted comment letters. AR Vol. II, Tab I; Vol. III Tab U, (Ex. 21). Through these letters the Town and the Governor indicated that they could not support the Tribe's trust application absent several additional restrictions and conditions. Id.

Section 151.11(b) guides the Bureau's consideration of comments received by state and local governments. The section states:

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) [comments by states and local governments concerning regulatory jurisdiction, real property taxes and special assessments] of this section.

25 C.F.R. § 151.11(b). In reviewing the comments of the Governor and the Town, the fact of the subject housing parcel is only separated from the Tribe's existing trust lands by a Town road, was taken into

consideration. Nonetheless, the Bureau took great care to evaluate the proposed jurisdictional and use conditions raised by the plaintiffs, referring several legal questions to the Regional Solicitor's Office. AR Vol. II., Tab K. By letter of December 10, 1997, the Area Director wrote to Governor Almond informing him that, as confirmed by the legal analysis of the Regional Solicitor's Office, the Bureau has no authority to subject the lands proposed for trust acquisition to the civil and criminal jurisdiction of the State, nor could the Bureau "by administrative fiat" alter whether or not the lands at issue fell within the "Indian lands" definition contained in IGRA. AR Vol. II, Tab L p.2-3. In sum, the Area Director considered all the applicable regulatory factors. His decision is supported by the record, is eminently reasonable, and should be upheld by this Court.

B. The Bureau's Decisionmaking Process Complied with the CZMA

Plaintiffs' seventh count alleges failure of the Secretary to comply with the requirements of the CZMA in the course of decisionmaking on the trust acquisition. Complaint ¶¶ 61-64. Specifically, plaintiffs allege that a Federal Consistency Review under section 1456 of the CZMA, which is implemented through Rhode Island's federally approved Coastal Resources Management Program ("RICRMP"), has not been adequately applied for with the relevant State agency, the RICRMC. The record shows compliance with the CZMA. Section 307 of the CZMA mandates that Federal agencies provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource. 16 U.S.C. § 1456(c)(1)(C). The National Oceanic and Atmospheric Administration's ("NOAA") CZMA regulations provide further that: "If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource, and a negative determination under § 930.35 is not required, then the Federal agency is not required to coordinate with State agencies under section 307 of the Act." 15 C.F.R. § 930.33(a)(2). The agency determines whether "an effect" exists "by looking at reasonably foreseeable direct and indirect effects." 15 C.F.R. § 930.33(a)(1).

In this case, effects to the coastal zone from the proposed fee-to-trust transfer were not reasonably foreseeable, and thus filing a consistency determination with RICRMC was not required.

Pursuant to NOAA's regulations, since the Bureau did not subject the trust acquisition to consistency review, the RICRMC should have notified the Bureau and requested a consistency determination before a final decision was made if the State believed the trust acquisition would have coastal effects. 15 C.F.R. § 930.34(c). Nothing in the record, however, indicates that the RICRMC required a consistency determination. In fact, the RICRMC demonstrated its concurrence with the BIA's treatment of this issue in a 1997 letter to the Tribe, which stated that the Tribe's "application for trust status is consistent with the RICRMP." AR Vol. II, Tab D (Ex. 11). Because this action does not require a negative determination under 15 C.F.R. § 930.35,[3] the BIA was not required to confer with the state agency, as was confirmed by the RICRMC. Thus, plaintiffs' CZMA claim must be rejected as inconsistent with the CZMA, NOAA's regulations and the State's own agency's determination.[4]

C. **The Bureau's Decisionmaking Process Complied with NEPA**

In their eighth count, plaintiffs allege that the Secretary's decision violates NEPA and the applicable Council on Environmental Quality ("CEQ") regulations. 40 C.F.R. §§ 1500, et seq. Contrary to plaintiffs' contention, the Bureau fulfilled its obligations under NEPA.

1. **NEPA Overview.** NEPA, 42 U.S.C. §§ 4321-4370e, requires federal agencies to prepare an Environmental Impact Statement ("EIS") if a proposed federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). Hence, the first step in agency compliance with NEPA is the determination whether the proposed action will have a significant effect. The mechanism

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[3] Section 930.35(a) requires a Federal Agency, when it finds there is no coastal effects, to file a negative determination for an agency activity:

(1) Identified by a State agency on its list, as described in § 930.34(b), or through case-by-case monitoring of unlisted activities; or

(2) Which is the same as or is similar to activities for which consistency determinations have been prepared in the past; or

(3) For which the Federal agency undertook a thorough consistency assessment and developed initial findings on the coastal effects of the activity.

The Agency activity here, taking the 31-acre parcel into trust, does not fall within any of these three categories and therefore does not require a negative determination.

[4] In any event, the claim is now moot as the RICRMC has granted the Tribe an Assent Modification for its housing development, which required a more stringent review than a consistency determination. See Exhibit 2 to Statement of Undisputed Facts.

for making this determination is an EA.[5] 40 C.F.R. § 1501.4(b) & (c). If, after preparing an EA, the agency determines that no significant effect will occur, it prepares a FONSI. 40 C.F.R. § 1501.4(e). A FONSI completes the NEPA process.

An agency need not engage in detailed environmental analysis before it can determine that an EIS is not required. See Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 209 (1st Cir. 1999). In challenging the Bureau's decision not to prepare an EIS, plaintiffs' must show "that there is [a] substantial possibility that [the agency's action] could significantly affect the quality of the human environment." Quinonez-Lopez v. Coco Lagoon Dev. Corp., 733 F.2d 1, 2 (1st Cir.1984).

When considering a claim that an EA is flawed, a court must ordinarily "defer to 'the informed discretion of the responsible federal agenc[y]." Oregon Natural Res. Council, 490 U.S. at 377 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412(1976)). Deference is due the agency, with a presumption that the agency's decisions are valid. See, e.g., Nat'l Crushed Stone Ass'n, 449 U.S. at 83.

2. The Bureau Adhered to NEPA. In the instant case, the Tribe supplied an EA in connection with its trust application as is proper under 40 C.F.R. § 1506.5(b). AR Vol. I, Tab L. The Bureau independently evaluated the EA. AR Vol. I, Tab S; Vol. II, Tab C (Ex.10). The agency's initial review revealed that the EA was not complete. The Bureau thus required the Tribe to supplement the EA with information concerning archeological sites and measures to protect them, and information from the United States Fish and Wildlife Service ("USFWS") concerning the presence, if any, of endangered species or their critical habitat. AR Vol. I, Tab S. USFWS provided the requisite species and habitat information. AR Vol. I, Tab U. The Tribe also supplied the Bureau with the additional archeological information. AR Vol. I, Tab V.

The Bureau's NEPA analysis was also informed by prior environmental review by the IHS,

[5] 40 C.F.R. § 1506.5(b) makes clear that agencies may permit an applicant to prepare an EA. In such cases, the agency "shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA." 40 C.F.R. § 1506.5(b). The agency does not need to redo acceptable work, but must verify the work which has been submitted. 40 C.F.R. § 1506.5(a).

Department of Health and Human Services, of the water supply and sewage disposal aspects of the Tribe's housing project. IHS found, inter alia, that the housing project as proposed and designed, would not affect wetlands or water resources, nor directly affect a coastal zone in a manner inconsistent with the RICRMP. AR Vol. I, Tab Y. IHS further documented the suitability of the property for use of individual sewage disposal systems (ISDS), and the fact that IHS and HUD had issued final site approvals for ISDS systems on the Tribe's housing project. In addition, IHS noted that the design for the project's sewage collection and treatment followed EPA guidelines, and that the project's water supply system would be designed according to EPA criteria. Id.

Based on the EA coupled with the supplemental information requested by the Bureau, the Bureau issued a FONSI.[6] AR Vol. II, Tab B. In addition to concluding that "the proposed action will have no significant adverse impact on the quality of the human environment . . . [n]o significant adverse affect on public health and safety . . . no significant controversial environmental effects . . . no significant archeological/historical sites [adverse impacts] . . . no threatened or endangered plant or animal species, or critical habitat [adverse impacts]," the FONSI made a positive finding that "*[i]mplementation of the proposed action will contribute to improved tribal health and public safety.*" Id. (emphasis added).[7] The FONSI completed the Bureau's obligations under NEPA and, contrary to plaintiffs' assertion, there was no need for the Bureau to undertake an EIS.

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[6] Plaintiffs assert that the Bureau's decision failed to consider the cumulative impacts associated with or likely to be associated with the parcel. Complaint ¶ 71. The regulations define cumulative impact as resulting from the "incremental impact . . . added to other past, present and reasonably foreseeable future actions . . ." 40 C.F.R. 1508.7. In its review, the Bureau considered the past uses of the parcel, the "generally rural character" and the low housing densities of the area, AR Vol. II, Tab C (Ex. 9), and considered the proposed housing project -- single family housing for tribal members -- id., but found that there were no other reasonably foreseeable future actions that would impact the parcel. Nothing in the record indicates any development of the parcel beyond the proposed housing units. The Bureau is not required to consider actions that are not reasonably foreseeable. See Pub. Utils. Comm'n of Cal. v. FERC, 900 F.2d 269, 283 (D.C. Cir. 1990) (Court found that since additional pipelines were not reasonably foreseeable, there was no need for the agency to consider the cumulative impacts of more than one pipeline).

[7] Recently, the Town bolstered this finding when it approved the Tribe's zoning permit for the housing development. The Clerk of the Zoning Board stated that the Tribe's housing development is "a good thing for both communities in the Town of Charlestown." See Exhibit 1 to Statement of Undisputed Facts.

While plaintiffs might desire a different substantive outcome, the case law is clear that NEPA does not impose substantive requirements on agency decisionmaking. NEPA does not, for example, require that federal activity *minimize* adverse environmental impact. Instead, it imposes a *procedural* requirement that agencies consider the environmental impact of proposed actions before taking them. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). The administrative record of the Area Director's decision to approve the Tribe's trust application demonstrates that the agency's decisionmaking was amply informed with respect to environmental issues and should be upheld.

D. NAHASDA Has No Relevance to the Secretary's Land Acquisition Authority

In their ninth count plaintiffs allege that the Secretary cannot decide to take land into trust for housing purposes in the absence of a local cooperation agreement under NAHASDA. Complaint ¶ 76. Plaintiffs have failed to state a claim as NAHASDA has no bearing on the Secretary of Interior's authority to approve a tribal trust application. Instead, that Act confers authority on the Secretary of HUD to "make grants under this section on behalf of Indian tribes to carry out affordable housing activities." 25 U.S.C. § 4111(a). While the existence of a local cooperation agreement under § 4111(c) of NAHASDA may be a prerequisite to the Secretary of HUD providing additional grant monies to the Tribe for the completion of its housing project, it has no relevance to the Secretary of Interior's decisionmaking authority under section 5 of the IRA. Thus, plaintiffs' ninth count must be rejected.

E. The Bureau's Decision Was Properly Based on the Tribe's Planned Use of the Subject Parcel for Housing Purposes

In their tenth claim, plaintiffs argue that the Secretary erred in not analyzing the potential use of the parcel for gaming under the IGRA. Complaint ¶¶ 80-82. Plaintiffs' assertions regarding gaming are purely hypothetical, and their argument that the Secretary needs to take such baseless claims into consideration is contrary to the regulatory regime.

Here, the BIA properly relied on the information in the Tribe's application to determine "the purposes for which the land will be used," 25 C.F.R. § 151.10(c), which, in turn, informed its

consideration of the other factors. The Tribe's application indicated in all respects that the purpose for the land is to provide sorely needed low-income and elderly housing for tribal members. AR Vol. II, Tab C. The administrative record reveals that, in accordance with the regulations, federal defendants expressly considered *this* purpose, and not other hypothetical purposes, in their evaluation of the Tribe's application. AR Vol. II, Tab K. Contrary to plaintiffs' assertion, the Secretary was not required to undertake an IGRA-related gaming analysis in the context of this non-gaming trust acquisition determination.

The IBIA previously considered and rejected plaintiffs' argument that the federal defendants abused their discretion in failing to consider the hypothetical use of the parcel for gaming: "The Board has held that mere speculation by a third party that a tribe might, at some future time, attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust." 35 IBIA at 103. The Board further noted that plaintiffs:

> have not cited anything in this case which suggests that the Tribe intends to use this parcel for a purpose other than housing. Their speculations do not carry their burden of proving that the Area Director did not properly exercise his discretion by considering only the proposed use of this parcel which the Tribe articulated.

Id. As the IBIA found, the administrative record of this case is devoid of anything that would suggest gaming as an intended purpose of the parcel at issue. Hence, the Board's disposition of the claim was correct and should be followed by this Court.

II. THE INDIAN REORGANIZATION ACT APPLIES TO THE TRIBE

A. Section 5 of the IRA Is Not Limited to "Historic" Tribes

Count two of plaintiffs' complaint asserts that the Secretary lacked authority under section 5 of the IRA to approve the Tribe's trust application because the provisions of the IRA apply only to tribes that were federally recognized in 1934, the date of the Act's passage. Complaint ¶ 44. Plaintiffs' interpretation is wrong and should be rejected by this Court. To begin with, the text of the IRA does not say what plaintiffs suggest it does. Section 5 of the IRA on its face makes no distinction between pre-

1934 and post-1934 tribes. For any such limit to apply to the federal government, Congress must be express. See, e.g., Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 827 (1997); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960).[8]

Plaintiffs' claim is also contrary to the 1983 Indian Land Consolidation Act, 25 U.S.C. § 2201-2219, which makes clear that the provisions of section 5 of the IRA "apply to all tribes notwithstanding the provisions of section 478 of [25 U.S.C.]."[9] 25 U.S.C. § 2202. Moreover, in 1994, Congress specifically amended the IRA to prohibit federal agencies from making distinctions among federally recognized tribes that have the effect of enhancing or diminishing their relative privileges and immunities. 25 U.S.C. § 476(f), (g). Section 476(f) provides:

> Departments 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 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, 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*. (emphasis added).

Section 476(g) provides:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In enacting these amendments, Congress' purpose was "to clarify that section 16 of the Indian

[8] One basis for plaintiffs' argument appears to be the mistaken belief that "[t]he Indian Reorganization Act of 1934 ("IRA") specifically defined and limited its application to 'Indians' who were members 'of any recognized Indian tribe . . . under Federal jurisdiction' on June 1, 1934." Complaint ¶ 44. Section 479 defines the terms "Indian" and "tribe" in the IRA to include those individuals that satisfy any one of three criteria: Indians are defined to include "[i] *all persons* of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [ii] *all persons* who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and [iii] *shall further include all other persons* of one-half or more Indian blood." (emphasis added). Plaintiffs, in contrast, appear to believe that the three criteria that independently qualify an individual as an "Indian" pursuant to the IRA are inclusive requirements rather than cumulative. The penultimate sentence of section 479 undermines plaintiffs' suggestion. That sentence defines the term "tribe" to include "any Indian tribe, organized band, pueblo, or *the Indians residing on one reservation*." 25 U.S.C. § 479, (emphasis added). See also 25 U.S.C. § 479(a) (defining "Indian tribe" to mean any "tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe").

[9] Section 478 was contained in the IRA as originally enacted and addresses the Act's application to tribes that voted against accepting the Act.

Reorganization Act [which permits tribes to organize under the IRA] was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes." 140 Cong. Rec. S6144-03, S6146 (daily ed. May 19, 1994) (Statement of Sen. McCain). (IRA section 16 is codified as 25 U.S.C. § 476).[10]

The federal acknowledgment regulations pursuant to which the Tribe attained federal recognition echo these enactments. The regulation provides:

> Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. *The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States.* It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and the United States as are other federally acknowledged tribes.

25 C.F.R. § 83.12(a) (emphasis added).

As the foregoing statutory and regulatory provisions make clear, the Secretary had no authority to, and in fact was precluded from, determining that the Narragansett Indian Tribe was ineligible for the benefits of section 5 of the IRA on the basis of the Tribe's post-IRA federal recognition. Such determination would necessarily "classify" the Tribe and diminish its privileges in relation to other federally recognized tribes in a manner that Congress has clearly prohibited. Thus, plaintiffs' claim must be rejected as contrary to law.

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

In their third count, the plaintiffs concoct an interpretation of the Settlement Act that renders another federal statute, the IRA, entirely ineffective. Importantly, plaintiffs cite neither language of the Settlement Act nor portions of its legislative history that even hints at such a far-reaching and unique

[10] Similarly, Title II of the Federally Recognized Indian Tribe List Act of 1994, ("The Tlingit and Haida Status Clarification Act"), 25 U.S.C. § 1211-1215, also expresses Congress' intent that "the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress." 25 U.S.C. §1212(4). The House Report accompanying the List Act explains that federal recognition "establishes tribal status for all federal purposes." H.R. Rep. No. 103-781, at 3 (1994).

repeal by implication. Indeed, the holdings of other courts and settled principles of statutory interpretation preclude plaintiffs' interpretation of the Settlement Act. As shown below, the Settlement Act in no way affects or alters the established federal scheme for accepting land into trust pursuant to the IRA.

Briefly, the Settlement Act and the IRA are entirely unrelated statutes. The clearly stated purpose of the Settlement Act was to extinguish the clouds on title arising out of the Tribe's aboriginal land claims, while offering the Tribe compensation and other remedies in exchange. See 25 U.S.C. § 1701; H.R. Rep. 95-1453, at 5, 95th Cong. 2d Sess. (1978) (stating purpose of Settlement Act as implementing settlement agreement regarding Tribe's aboriginal land claim). To achieve that end, the statute effectively ratified a settlement reached between the Tribe and the State parties known as the Joint Memorandum of Understanding ("JMOU" or "Settlement Agreement"). At no point does the Settlement Act or Settlement Agreement address issues pertaining to the United States accepting any lands into trust on behalf of the Tribe. It is the IRA, 25 U.S.C. §.465, and the regulations at 25 C.F.R. Part 151, that govern applications by federally-recognized tribes to have lands accepted into trust status.

There is no express provision in the Settlement Act that bars application of the IRA to this Tribe. In contrast, in the Maine Settlement Act, 25 U.S.C. § 1724(e), Congress expressly precluded application of section 5 of the IRA. If Congress had intended to repeal the IRA in the Rhode Island Settlement Act, it would have done so expressly. In fact, the Settlement Act does not even reference section 5 of the IRA. There is also no ambiguity in the Settlement Act that could be read to limit the application of the land-into-trust provisions of the IRA. Even if there were, a cardinal rule applied by the Supreme Court is that, "repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974) (quoting Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503 (1936)). In Morton, plaintiffs argued, similar to the present argument, that a latter statute was intended to repeal a "longstanding, important component of the Government's Indian program." Id. at 550. In rejecting the plaintiffs' argument, the Court held "[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 merely settles the Tribe's aboriginal land claim, and the IRA, which is a pillar of the United States' Indian program.[19] "The 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 Second Circuit recently rejected a virtually identical argument by the State of Connecticut and three Connecticut towns, and found that the Connecticut Indian Land Claims Settlement Act (the "Connecticut Settlement Act"), 25 U.S.C. § 1751 (2001), was capable of co-existence with the IRA. In Connecticut ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82 (2d Cir. 2000), the plaintiffs similarly argued that a settlement act regarding the Mashantucket Pequot Indian Nation was intended to bar the application of the IRA on lands outside the Tribe's settlement lands. The Court, however, found that because the Connecticut Settlement Act addressed only lands purchased with the specified funds, and was "silent with regard to lands . . . not purchased with settlement funds," the Connecticut Settlement Act could not override the IRA. Id. at 88. "Nothing in [the Connecticut Act] supplants the Secretary's power under the IRA to take into trust lands acquired without the use of settlement funds." Id.

The present case is analogous to Connecticut. Because the Rhode Island Settlement Act similarly is silent regarding the status of lands purchased by the Tribe outside its settlement area, nothing in the

[19] Indeed, neither the Settlement Act nor the Settlement Agreement address issues pertaining to the United States taking land into trust on behalf of the Tribe. When the Tribe ultimately applied to have its Settlement Lands accepted into trust, it did not invoke the Settlement Act. Instead, it properly invoked the IRA. When the Interior Department decided to take the land into trust pursuant to the IRA in 1987, plaintiff Town of Charlestown challenged the decision, raising the very argument advanced here. The Interior Board of Indian Appeals rejected the Town's argument, concluding "[t]he Board finds nothing in the Settlement Act that precludes trust acquisition of the settlement lands or imposes any requirements for their acquisition beyond those contained in 25 C.F.R. Part 151." Town of Charlestown, Rhode Island v. E. Area Dir., BIA, 18 IBIA 67, 71 (1989). Plaintiffs reprise the identical argument in yet another attempt to read limitations into the Settlement Act that clearly do not exist.

Settlement Act supplants the Secretary's power under the IRA to accept land into trust.[12] As in Connecticut, the fact that the Settlement Act was intended to resolve the Narragansett Tribe's aboriginal land claims did not bar the Tribe from forever seeking to have lands taken into trust pursuant to the IRA.

Indeed, in considering this very issue on two separate occasions, the IBIA convincingly has held that nothing in the Rhode Island Settlement Act precludes the operation of the IRA. In Charlestown I, the IBIA rejected the plaintiff Town's argument that the IRA barred the Secretary from accepting the original Settlement Lands into trust after the Tribe became federally recognized. Town of Charlestown, Rhode Island v. E. Area Dir., BIA, 18 IBIA 67, 71 (1989). The IBIA reached a similar conclusion the second time it considered this issue when the present plaintiffs argued that the IRA barred trust acquisitions outside the settlement lands. The Board found "no support" in the language in the Settlement Act for plaintiffs' "reading of it as precluding the trust acquisition of other lands for the Tribe in the event the Tribe were to be Federally acknowledged." 35 IBIA at 100.

Furthermore, the language in the Settlement Agreement itself contradicts plaintiffs' interpretation. As the IBIA observed, the Settlement Agreement -- to which the plaintiffs here were parties -- anticipated that the then-unrecognized Narragansett might receive federal recognition and the federal services attendant to recognition. Id. at 101. One provision of the Settlement Agreement provides:

> [T]he plaintiff in the Lawsuits will not receive Federal recognition for purposes of eligibility for Department of the Interior services as a result of Congressional implementation of the provisions of this [settlement agreement], but will have the same right to petition for such recognition and services as other groups.

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[12] Even the legislative history of the Connecticut Settlement Act is comparable to the Rhode Island Settlement Act. As the Second Circuit noted, the Connecticut Settlement Act was not 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." 228 F.3d at 90. As discussed supra, the Rhode Island Settlement Act shares a similar legislative history. Although both were intended to serve as once-and-for-all settlements of aboriginal land claims, neither sought to limit the scope of the respective tribes' sovereignty forever. As in Connecticut, no provision in the Rhode Island statute or its legislative history supports plaintiffs' claim that the statute was intended to do more and render the IRA ineffective vis-a-vis this Tribe. In fact, the Rhode Island Settlement Act likely served as a model for the Connecticut Settlement Act. See H. Rep. No. 95-1453, at 1951, (1978), reprinted in 1978 U.S.C.C.A.N. 1948, ("The committee is convinced that this legislation will serve as a landmark for the resolution of other land claims by eastern tribes under the Trade and Intercourse Act.").

Settlement Agreement ¶ 15. AR Vol. III, Tab R (Ex. I, p.3). Clearly, one of the services available to recognized tribes is the ability to petition the Secretary to take land into trust. As the IBIA observed, "Section 15 of the settlement agreement would have been a logical place for the parties to set out any restrictions which they intended to place on the Secretary's authority to acquire additional land in trust for the Tribe. The fact that no such restrictions appear here--or elsewhere in the settlement agreement--suggests that none were intended." 35 IBIA at 101. Similarly, if Congress had intended such a limitation, it could have precluded application of section 5 of the IRA, as Congress did in the Maine Settlement Act.[13] Nor does the legislative history of the Settlement Act hint that Congress wanted to repeal by implication Section 5 of the IRA.[14] See H.R. Rep. 95-1453 (1978). Plaintiffs' claim must be rejected as completely unsupported and contrary to law.

III. THE INDIAN REORGANIZATION ACT IS CONSTITUTIONAL

A. Section 5 of the IRA Is a Constitutional Conferral of Congressional Authority

In their fifth count, plaintiffs allege that the Secretary's decision to accept the subject parcel into trust pursuant to this section "is void and of no legal effect," because section 5 of the IRA "delegates unrestricted and limitless power to the Secretary to acquire land for Indians." Complaint ¶¶ 56, 57. Plaintiffs' nondelegation challenge fails as there clearly is an "intelligible principle" underpinning Congress' enactment of section 5 of the IRA -- the restoration of land to Indian ownership to promote the

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[13] See 25 U.S.C. § 1724(e). As the Second Circuit found in Connecticut: "The absence of an analogous provision in the [Connecticut] 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." Connecticut, 228 F.3d at 90. Furthermore, in the Rhode Island Settlement Agreement, the parties agreed that "[t]his legislation shall not purport to affect or eliminate the claim of any individual Indian which is pursued under any law generally applicable to non-Indians as well as Indians in Rhode Island." Settlement Agreement ¶ 6. AR Vol. III, Tab R (Ex. I p.2).

[14] Although the Settlement Act clearly does not contain any ambiguities that would suggest the IRA does not apply, if the Court found any ambiguity in the Act on this issue, the Court should give deference to the agency's interpretation that the IRA applies to the present lands. See Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 233 (1986). Furthermore, as the Supreme Court has noted, "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). See also Connecticut, 228 F.3d at 92-93 (applying the Indian canon of construction to the Connecticut Settlement Act).

economic and political self-determination of Indian tribes. See Mistretta v. United States, 488 U.S. 361, 372 (1989) (test of validity of an act is whether Congress has laid down an intelligible principle for agency authorized to exercise entrusted authority); Morton v. Mancari, 417 U.S. 535, 542 (1974) (discussing purposes of the IRA). In the sixty eight years since the IRA was enacted, no challenge to the IRA on the ground that section 5 is an unconstitutional delegation of legislative power has been upheld. Plaintiffs' claim, therefore, must be rejected as contrary to the weight of the case law, particularly when read against the applicable standard which requires that Congressional conferrals of decisionmaking authority delineate a general policy, the agency to apply it and the boundaries of the authority.

1. The Nondelegation Doctrine. Article I, Section 1 of the United States Constitution, from which the nondelegation doctrine derives, provides that, "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." "In a delegation challenge, the constitutional question is whether the statute seeks to delegate legislative power to [an] agency." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). While Congress may not delegate its legislative powers, id. (citing Loving v. United States, 517 U.S. 748, 771 (1996)), it may confer decisionmaking authority so long as it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Mistretta, 488 U.S. at 372-373 (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)). A court can find a statute unconstitutional under the nondelegation doctrine only if there is an absence of guiding standards such that "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." Mistretta, 488 U.S. at 379 (quoting Yakus v. United States, 321 U.S. 414, 425-26 (1944)).

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority: "[O]ne [statute] provided literally no guidance for the exercise of discretion, and the other . . . conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Am. Trucking, 531 U.S. at 474 (quoting Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter

Poultry Corp. v. United States, 295 U.S. 495 (1935)). Since 1935, the Court has narrowly construed the nondelegation doctrine and has consistently upheld congressional enactments containing broad conferrals of decisionmaking authority.

2. The Indian Reorganization Act. The IRA was enacted in 1934 to provide a framework for tribes to reorganize by adopting governing constitutions and to enable the Secretary to restore or replace the lands, and the related economic opportunities, that were lost to tribes through the allotment policy. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992). The IRA was intended to address "the imperative need of comprehensive legislation to remedy the existing conditions among the American Indians generally." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). Those conditions included the loss of over 90 million acres of Indian land, which decimated tribes and undermined the health and well being of their members. See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 436, n. 1 (1989). The Supreme Court has, on several occasions, discussed the purposes behind the IRA and found them to include "rehabilitat[ion of] the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism," Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) and "establish[ment of the] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Morton v. Mancari, 417 U.S. at 542.

In recognition that restoration and protection of the tribal land base was central to tribal economic and political self-determination, Congress enacted section 5 of the IRA which incorporates these principles. Section 5 of the Act provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee is living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is

> hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $ 2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H. R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona and for other purposes, and the bills (S. 2531 and H. R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. In furtherance of the policy and boundaries of decisionmaking supplied by Congress, the Interior Department's detailed implementing regulations require consideration of several discrete factors, including the petitioning tribe's need for land and the impacts to States and their political subdivisions. 25 C.F.R. Part 151.

3. Section 5 of the IRA Survives Plaintiffs' Nondelegation Challenge. Plaintiffs' nondelegation challenge fails because applying the three factors set out in Mistretta to section 5 of the IRA, Congress plainly delineated the Department of the Interior as the "public agency which is to apply" the statute, a "general policy" of promoting Indian self-determination and economic self-sufficiency, and the "boundaries" for implementing this policy -- acquisition of land for Indians as necessary to effectuate the self-determination policies of the Act. See Mistretta, 488 U.S. at 373.

The purpose of section 5, and the boundaries of the Secretary's authority to effectuate it, must be evaluated in light of the general purposes and historical context of the IRA, Am. Power & Light Co., 329 at 104, and the Supreme Court's observation that its nondelegation jurisprudence "has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job

absent an ability to delegate power under broad general directives." Mistretta, 488 U.S. at 372. Congress enacted the IRA to promote Indian self-government and economic development and to preserve Indian communities by, inter alia, authorizing the Secretary to acquire lands by "purchase, relinquishment, gift, exchange, or assignment" sufficient to accomplish these purposes. 25 U.S.C. § 465. The policy catalyst behind the IRA was the recognition that the Interior Department could not foster Indian self-determination or economic development without the restoration and increase of the tribal land base. Trust status was necessary to protect acquired land from further alienation. See 78 Cong. Rec. 11727 (Statement of Representative Howard).

The IRA properly grants to the Secretary the discretion necessary to serve its purposes in relation to the needs of particular Indians and Indian tribes. See Lichter v. United States, 334 U.S. 742, 785 (1948). Section 5 provides an "intelligible principle" to the Secretary: restoration of land to Indian ownership to enable Indians to become economically and politically self-sufficient. Although the Act authorizes the Secretary to exercise her discretion, the Supreme Court has consistently upheld congressional conferrals of decisionmaking authority that require the exercise of discretion. Mistretta, 488 U.S. at 378. As the Court explained in Yakus:

> It is no objection that the determination of facts and the inferences to be drawn from them in light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework . . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [Congress'] choice of means for effecting its declared purpose . . . .

321 U.S. at 425-26 (citations omitted).

Following Yakus' guidance, the IRA does provide standards for the guidance of the Administrator's action such that a court could "ascertain whether the will of Congress has been obeyed." Id. The Secretary is charged under section 5 with remedying the loss of Indian land through acquisition, in trust, of land for Indians to promote Indian self-determination. Thus, a reviewing court may examine

the acquisition to determine whether the Secretary properly exercised her discretion in acquiring any particular parcel. Also, the IRA provides specific boundaries for the Secretary by describing policies and purposes for which land may be taken into trust and by providing that no lands are to be acquired in New Mexico or Arizona for the Navajo Indians. In sum, section 5 of the IRA "fits comfortably within the scope of discretion permitted by []precedent." Am. Trucking, 531 U.S. at 476.[19]

4. Nondelegation Challenges to the IRA. Every court to have considered Section 5 has upheld it against nondelegation challenges, with the exception of the Eighth Circuit's short-lived decision in South Dakota v. Dep't of Interior, 69 F.3d 878 (1995) [hereinafter South Dakota], which was vacated by the Supreme Court in, Dep't of Interior v. South Dakota, 519 U.S. 919 (1996). In United States v. Roberts, 185 F.3d 1125, 1136-38 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000), the Tenth Circuit rejected the Eighth Circuit's analysis in South Dakota and found Section 5 to provide sufficient standards for the Secretary's exercise of discretion. Id. at 1136-37. See also City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 473 (D. D.C. 1978) (holding that section 5 of the IRA is not an unconstitutional delegation of authority); 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) (rejecting argument that the IRA unconstitutionally delegates standardless authority to the Secretary and granting the United States summary judgment on that claim); Shivwits Band of Paiute Indians v. Utah, No. 2:95C-1025C, 2002 U.S. Dist. LEXIS 1956 at *8 (D. Utah, Feb. 6, 2002) (affirming prior order holding Section 5 of the IRA constitutional). In addition, when courts have addressed other statutes directing the Secretary to accept land into trust for Indian tribes, they have uniformly found these statutes to be acceptable conferrals of authority. See Churchill County v. United States, No. CV-N-00-0075-ECR-RAM, 2001 U.S. Dist.

[19] See also Am. Power & Light, 329 U.S. at 105 (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Yakus, 321 U.S. at 426 (upholding delegation to Price Administrator to fix commodity prices that would be fair and equitable and would effectuate purposes of act); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require).

LEXIS 18489, at *6 (D. Nev. March 21, 2001) (statute mandating Secretary accept certain lands into trust was not "impermissible delegation of legislative power.").

State challenges to Secretarial decisions to acquire land into trust for tribes typically cite the exception, South Dakota, as authority for their nondelegation doctrine assaults on the IRA. In South Dakota, the Eighth Circuit held that section 5 of the IRA violated the nondelegation doctrine and that the Secretary therefore had no authority to acquire lands in trust for the Lower Brule Sioux Tribe. 69 F.3d at 878. As noted above, that decision was vacated by the Supreme Court in Dep't of Interior v. South Dakota, and hence has no precedential value. 519 U.S. at 919 (granting certiorari, vacating, and remanding to the Secretary of Interior for reconsideration of administrative decision). Moreover, in South Dakota, the Eighth Circuit was concerned primarily that the land acquisition was unreviewable under the Quiet Title Act. See 69 F.3d at 878. This troubled the Court as one factor in the consideration of whether a statute violates the nondelegation doctrine is the opportunity for a court to determine whether the "will of Congress" was followed. Id. at 881. Since the Eighth Circuit decision, the Department has revised its regulations. See 61 Fed. Reg. 18082 (April 24, 1996) (codified at 25 C.F.R. § 151.12(b) (2002)). The regulations remedy the concerns expressed by the Eighth Circuit and now assure that challenges to acquisition decisions may be brought before the lands are taken into trust. Hence, a primary component of the Eighth Circuit's rationale no longer exists.

Outside the context of section 5 of the IRA, and since vacating the Eighth Circuit's decision in South Dakota, the Supreme Court has provided additional guidance to courts faced with nondelegation doctrine challenges. In American Trucking, the Court reviewed its nondelegation case law and found that the scope of discretion in the statute directing the Administrator of the EPA to set 'ambient air quality standards . . . allowing an adequate margin of safety, [which] are requisite to protect the public health'" fell well within the outer limits of the Court's nondelegation precedents. Am. Trucking, 531 U.S. at 472 (quoting 42 U.S.C. § 7409(b)(1)). The Court emphasized that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those

executing or applying the law," Id. at 474-475 (quoting Mistretta, 488 U.S. at 416). The Court's analysis of past cases upholding broad grants of authority, included reference to Lichter, 334 U.S. 742, which involved a statute authorizing agencies to recoup "excess profits" paid under wartime Government contracts. Am. Trucking, 531 U.S. at 475 (quoting Lichter, 334 U.S. at 783-86). The Court in Lichter "did not insist that Congress specify how much profit was too much." Id.[10] In this connection the Court noted that a "certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." Id., (quoting Mistretta, 488 U.S. at 417).

In Mistretta, the Court upheld Congress' statutory conferral of broad power to the Sentencing Commission to issue binding guidelines for sentencing all persons convicted of federal crimes. 488 U.S. 361. The Mistretta majority explicitly recognized Congress' power to confer authority "to exercise judgment on matters of policy." 488 U.S. at 378. Similarly, in Yakus, the Court upheld a conferral that empowered the Administrator to promulgate regulations fixing prices of commodities based on "'his judgment [of what] will be fair and equitable and will effectuate the purposes' of this Act" when, in his judgment their prices "have risen . . . or threaten to rise 'to an extent or in a manner inconsistent with the purposes' of the Act." 321 U.S. at 448 (quoting 50 U.S.C. § 902). In short, courts overwhelmingly have upheld congressional conferrals of decisionmaking authority involving broad standards and extensive responsibilities.[11] This Court should follow the weight of precedent and reject plaintiffs' nondelegation

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[10] The D.C. Circuit had held that the EPA had construed the Clean Air Act standards so loosely as to render them unconstitutional delegations of legislative power. The court found that according to EPA's interpretation:

> it is as though Congress commanded EPA to select 'big guys,' and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, 'How tall? How heavy?'

Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999). The Supreme Court unanimously rejected the D.C. Circuit's nondelegation analysis, holding that the Clean Air Act's broad delegation was sufficiently intelligible to pass constitutional muster.

[11] For other cases upholding broad conferrals of decisionmaking authority, see Kent v. Dulles, 357 U.S. 116 (1958) (upholding delegation providing "Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States . . .") Id. at 123; Zemel v. Rusk, 381 U.S. 1 (1965) (upholding delegation of power to the Secretary of State to enforce an executive order to prohibit citizens from receiving passport to travel to particular country); Touby v. United States, 500 U.S. 160 (1991) (upholding delegation of power to the Attorney General to define conduct as criminal).

attack on Section 5 of the IRA.

B. **There Is No Tenth Amendment, Eleventh Amendment, or Enclave Clause Barrier to the Secretary's Acquisition of Land Into Trust For Tribes**

Plaintiffs' fourth count alleges only that "[t]he decision of the Secretary . . . entrenches upon and diminishes the sovereignty of the State of Rhode Island." Complaint ¶ 54. Plaintiffs' sixth count asserts that "the decision of the Secretary to accept the Parcel in trust, without the consent of the State, violates Article I. Sec. 8, cl.17 and the Eleventh Amendment of the United States Constitution, unless state civil and criminal jurisdiction is retained over the Parcel." Complaint ¶ 60. These counts are too conclusory to allow full response at this time. If plaintiffs further develop these arguments, federal defendants will respond in full in their response to plaintiffs' brief in support of summary judgment.

Plaintiffs, however, have a high burden with respect to their constitutional claims as the starting point for assessing them must be the presumption of constitutionality accorded federal statutes. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (invoking the "presumption of constitutionality which attaches to every Act of Congress"); see also Kyle Rys. v. Pac. Admin. Servs., 990 F.2d 513, 518 (9th Cir. 1993) (due process challenge entailed difficult burden since legislative Acts "come to the Court with a presumption of constitutionality"). When Congress legislates in the special area of Indian affairs the presumption of constitutionality is even stronger. As explained by the Supreme Court in Morton v. Mancari, 417 U.S. at 551-552:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. 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.

With respect to plaintiffs' sixth count we note that the Eleventh Amendment component of it is baseless because the trust status of land has no apparent nexus to suits against states in federal court. Further, the Eleventh Amendment has no application regarding suits by states against the federal government. Alden v. Maine, 527 U.S. 706, 755 (1999). Furthermore, to the extent that plaintiffs appear to be making an Enclave Clause argument through reference to Article I. Sec. 8, cl.17, we note that the

Enclave Clause is not triggered here because accepting land into trust for Indian tribes does not create an exclusive jurisdictional enclave. See, e.g., United States v. McGowan, 302 U.S. 535, 539 (1938)("The Federal Government does not assert exclusive jurisdiction within the [reservation.]"); Nevada v. Hicks, 533 U.S. 353, 409 (2001) ("State sovereignty does not end at a reservation's border."). Accordingly, plaintiffs' Enclave Clause argument -- even if resurrected in a more viable context than the Eleventh Amendment -- fails to state a claim.

CONCLUSION

For the foregoing reasons, federal defendants respectfully request that this Court grant their Motion for Summary Judgment on all of plaintiffs' claims.

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Respectfully submitted,

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